80-1240

Office-Supreme Court, U.S.
FILED
JAN 21 1981
ALEXANDER L. STEVAS,
CLERK

No.

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1980

MICHAEL P. LANE,

*Petitioner,*

*v.*

LAWRENCE WILLIAMS and OSCAR SOUTHALL,

*Respondents.*

**PETITION FOR WRIT OF CERTIORARI**
**TO THE UNITED STATES COURT OF APPEALS**
**FOR THE SEVENTH CIRCUIT**

TYRONE C. FAHNER,
Attorney General,
State of Illinois,

MELBOURNE A. NOEL, JR.,

MICHAEL B. WEINSTEIN,
Assistant Attorneys General,
188 W. Randolph St.,
Suite 2200,
Chicago, Illinois 60601,
(312) 793-2570,
*Attorneys for Petitioner.*

Printed by the Authority of the State of Illinois—1-81-40.

## QUESTIONS PRESENTED FOR REVIEW

### I.

Whether the decision of the United States Court of Appeals for the Seventh Circuit directly conflicts with this Court's recent decision in *United States* v. *Timmreck*.

### II.

Whether the Court of Appeals acted incorrectly in retroactively applying its prior decision in *United States ex rel. Baker* v. *Finkbeiner* to the instant case.

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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1980

GAYLE FRANZEN,

*Petitioner,*

*v.*

LAWRENCE WILLIAMS and OSCAR SOUTHALL,

*Respondents.*

**PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT**

## OPINIONS BELOW

This Petition seeks review of the decision of the United States Court of Appeals for the Seventh Circuit as it pertains to respondents Lawrence Williams and Oscar Southall. *United States ex rel. Williams* v. *Morris,* 633 F. 2d 71 (7th Cir. 1980). The Court of Appeals' decision affirmed in part and reversed in part the decision and judgment of the United States District Court, Northern District of Illinois, Eastern Division, which granted respondents' applications for Writs of Habeas Corpus.[1] *United States* ex. rel. *Williams* v. *Morris,* 483 F. Supp. 775 (N. D. Ill. 1980).

[1] Since the Court of Appeals ruled in favor of Petitioner with regard to a third individual (*i.e.*, Emanuel Williams), review is not sought as the decision pertains to him. *See* Supreme Court Rule 21.1(b).

As noted in the Court of Appeals' decision, the Petitions for Writs of Habeas Corpus had been consolidated in the District Court, which originally ruled in favor of the respondents in 1978. The District Court's ruling was based upon a finding that respondents' fourteenth amendment due process rights were violated by the failure to inform them of a three year mandatory parole term which would automatically attach to the penitentiary sentences respondents received as part of negotiated plea agreements. *United States ex rel. Williams* v. *Morris,* 447 F. Supp. 95 (N. D. Ill. 1978) (hereinafter referred to as "*Williams I*"). Subsequently, however, the Court of Appeals reversed that decision, holding that respondents had failed to exhaust an available state court remedy. *United States ex rel. Williams* v. *Morris,* 594 F. 2d 614 (7th Cir. 1979).

Upon remand to the District Court, respondents renewed their requests for expungement of their mandatory parole terms, contending that an intervening Illinois Supreme Court decision conclusively demonstrated that resort to the state courts was futile. The District Court agreed and, for the reasons set forth in *Williams I,* granted the relief sought. *United States ex rel. Williams* v. *Morris* 483 F. Supp. 776 (N. D. Ill. 1980) (hereinafter referred to as "*Williams II*"). It is from the Court of Appeals' decision in *Williams II* that the petitioner now seeks a Writ of Certiorari.

## JURISDICTION

The Court of Appeals' decision was rendered on October 22, 1980. No Petition for Rehearing was filed in that Court. This Petition is being filed within 90 days of the date of the Court of Appeals' decision as per 28 U. S. C. § 2101(c). This Court's jurisdiction is invoked under 28 U. S. C. § 1254(1).

## CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The fourteenth amendment to the Constitution of the United States provides, in pertinent part, that:

> No State shall . . . deprive any person of life, liberty, or property, without due process of law; . . . .

*Ill. Rev. Stat.*, 1973, ch. 38, § 1005-8-1(e) provides that:

> Every indeterminate sentence shall include as though written therein a parole term in addition to the term of imprisonment. Subject to earlier termination under Section 3-3-8, the parole term shall be as follows:
>
> (1) for murder or a Class 1 felony, 5 years;
>
> (2) for a Class 2 felony, or a Class 3 felony, 3 years;
>
> (3) for a Class 4 felony, 2 years.

## STATEMENT OF THE CASE

The factual situations in each of the two cases are set forth below according to the names of each of the respondents involved.

### LAWRENCE WILLIAMS

On March 11, 1975, respondent Lawrence Williams pled guilty in the Circuit Court of Cook County, Illinois (No. 74-3339) to a single charge of burglary. At that time, burglary carried a penalty of one to twenty years imprisonment followed by three years mandatory parole. *Ill. Rev. Stat.*, 1975, ch. 38, §§ 19-1, 1005-8-1(b)(3), 1005-8-1(c)(3), 1005-8-1(e)(2). Under the terms of a plea agreement between Williams' public defender and the prosecutor, Williams was to receive an indeterminate sentence of from one to two years in prison. The trial judge was a party to the conference at which the plea agreement was finally struck. (L. Williams, R. 6, Ex. A, pp. 2 and 3).[2]

Before accepting the plea, the trial judge admonished the defendant of the consequences of his plea. (L. Williams, R. 6, Ex. A, pp. 3-14). He had the prosecutor repeat the terms of the plea bargain in open court and elicited Williams' understanding and acceptance of its terms. (L. Williams, R. 6, Ex. A, p. 4). The trial judge also indicated that, pursuant to the plea agreement, the court had agreed to accept the sentencing recommendation of the State, conditioned upon the truth of the

[2] The various documents constituting the records on appeal in the Seventh Circuit have been marked in each case by the District Court clerk. Unless the Appendix used in the Court of Appeals is being referred to, the designation (Name, R. ____, Ex. ____, p. ____) will be used throughout this brief to designate the case, document number, and page of the document referred to. References to the Appendix will be in the following manner. (A. ____).

factual information supplied to the court concerning the defendant. (L. Williams, R. 6, Exhibit A, p. 5). The transcript contains no statement by the court, the prosecutor or the public defender that the recommended sentence included a mandatory parole term.

The judge then received Williams' acknowledgment that he understood the nature of the charges and understood his constitutional rights to remain silent, to be tried before a jury, to be proven guilty beyond a reasonable doubt, and to confront and cross-examine witnesses. (L. Williams, R. 6, Ex. A, pp. 5-10). A factual basis for the plea was established and Williams indicated that he understood that by pleading guilty he admitted those facts. (L. Williams, R. 6, Ex. A, pp. 10-11). The trial judge then described the potential statutory penalty for the charged offense, omitting any mention of a mandatory parole term. (L. Williams, R. 6, Exhibit A, pp. 12-13). After hearing evidence in aggravation and mitigation, the trial court sentenced Williams to not less than one nor more than two years in prison.

Lawrence Williams was imprisoned until May 20, 1976, when he was released on parole having served approximately seventeen months in prison. Williams stated in his Petition for Writ of Habeas Corpus that he was unaware that a mandatory parole term attached to his sentence until approximately two months prior to his discharge. (L. Williams, R. 1, p. 4). While serving his three year mandatory parole term, respondent was arrested and subsequently found to be a parole violator. Williams had been reincarcerated at Stateville Correctional Center, Joliet, Illinois, when the original Writ of Habeas Corpus was issued. *See Williams I*, 447 F. Supp. 95. Before the denial of a Motion to Reconsider in *Williams I* took effect, the respondent was released on six months mandatory release on February 1, 1978, pursuant to *Ill. Rev. Stat.*, 1977, ch. 38, §1005-8-1. This revised law also had the effect of reducing Williams' parole term from three to two years. Williams'

period of mandatory release expired on August 1, 1978, at which time he was released from the custody of the Illinois Department of Corrections. In sum, respondent served approximately twenty-eight months in prison.

## OSCAR SOUTHALL

On March 19, 1975, respondent Southall, like respondent Williams, pled guilty in the Circuit Court of Cook County, Illinois (No. 75-228) to one count of burglary. At that time, burglary carried the same penalty of one to twenty years imprisonment followed by three years mandatory parole. *Ill. Rev. Stat.*, 1975, ch. 38, §§ 19-1, 1005-8-1(b)(3), 1005-8-1(c)(3), 1005-8-1(e)(2). Pursuant to a plea agreement between Southall's public defender and the prosecutor, Southall was to receive an indeterminate sentence of from one to three years. This agreement was reached at a conference in which the trial judge was present and had indicated that he would sentence the defendant to one to three years. (O. Southall, R. 6, Ex. A, pp. 2, 5, 6).

The transcript reveals that neither the trial judge nor the attorneys disclosed the existence of the mandatory parole term during their discussion of either the plea agreement or the possible sentence which could be imposed.

The trial judge explained to Southall that by pleading guilty he waived his constitutional rights to a trial by jury and to confront and cross-examine witnesses. (O. Southall, R. 6, Ex. A, p. 4). The judge received Southall's acceptance and acknowledgment of these consequences. (O. Southall, R. 6, Ex. A, p. 4). Southall responded negatively to the question of whether his guilty plea had been induced by force, duress, threats or promised rewards. (O. Southall, R. 6, Ex. A, p. 4). The judge next described his conversation with Judge Strzalka, who had previously placed Southall on two years probation in May, 1974, for an earlier offense. After being advised of the

pending charge and the plea negotiations, Judge Strzalka reportedly stated that if Southall pled guilty to the burglary charge, he (Judge Strzalka) would either find a violation of probation and impose a concurrent sentence for the same term, or would order the probation revoked and terminated as unsatisafctory. (O. Southall, R. 6, Ex. A, pp. 5, 6). (At the probation hearing on June 10, 1976, Judge Strzalka took the second option and terminated Southall's probation as unsatisfactory.)

At this time, the trial judge stated that as a result of a pretrial conference, the court would impose the sentence which had been discussed. (O. Southall, R. 6, Ex. A, p. 6). Finally, after establishing a sufficient factual basis for the plea, the trial court accepted the guilty plea and sentenced Southall to an indeterminate term of one to three years in prison. (O. Southall, R. 6, Ex. A, pp. 7-9).

Southall was imprisoned until September 22, 1975, when he completed his prison sentence (less time off for good behavior) and was released on parole having served approximately eleven months in prison. He was declared a parole violator on October 8, 1976, and was reincarcerated pursuant to the three year mandatory parole provisions implicit in his original sentence. Respondent Southall was subsequently reparoled and discharged from the custody of the Illinois Department of Corrections as of October 24, 1979. He had served approximately twenty-three months in prison.

As previously noted, both Williams and Southall subsequently filed Petitions for Writs of Habeas Corpus, pursuant to 28 U.S.C. § 2254, in the United States District Court, Northern District of Illinois, Eastern Division.

## REASONS FOR GRANTING THE PETITION FOR WRIT OF CERTIORARI

### I.

### THE DECISION OF THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT DIRECTLY CONFLICTS WITH THIS COURT'S RECENT DECISION IN *UNITED STATES* v. *TIMMRECK*.

This Court, in its recent decision in *United States* v. *Timmreck*, 441 U.S. 780 (1979), ruled that a federal offender may not receive collateral relief from a guilty plea based upon a failure to advise him of the mandatory special parole term required by 21 U. S. C. § 841(b)(1)(A). In *Timmreck*, the defendant, acting on advice of counsel, pled guilty to a charge of conspiracy to distribute various controlled substances. As required by Fed. Rules Crim. Proc. Rule 11, the District Judge formally addressed the defendant and determined that there was a factual basis for the plea and that he was acting voluntarily. The judge admonished the defendant that he could receive a sentence of up to 15 years imprisonment and a $25,000 fine; however, he failed to advise the defendant of the mandatory special parole term of at least three years.

The District Judge accepted the guilty plea and, at a later proceeding, sentenced the defendant to 10 years imprisonment, plus a mandatory special parole term of 5 years, and a fine of $15,000. Pursuant to a plea bargain with the prosecutor, other charges against the defendant were dismissed. No objection to the sentence was raised at that time and the defendant did not take a direct appeal from his conviction.

Approximately two years later, the defendant moved to vacate the sentence pursuant to 28 U. S. C. § 2255 on the ground that the trial judge had violated Rule 11 by accepting his plea without informing him of the mandatory special parole term. Following an evidentiary hearing, the District Court

denied Timmreck's motion. *Timmreck* v. *United States,* 423 F. Supp. 537 (E. D. Mich. 1976). The District Court recognized that a violation of Rule 11 had occurred but, relying heavily on Judge (now Justice) Stevens' concurrence in *Bachner* v. *United States,* 517 F. 2d 589 (7th Cir. 1975), concluded that collateral relief was not justified since the defendant had received a sentence within the maximum described to him at the time the guilty plea was accepted and thus he had not suffered any prejudice. 423 F. Supp. at 539-540.

The Sixth Circuit Court of Appeals reversed. *Timmreck* v. *United States,* 577 F. 2d 372 (6th Cir. 1978). That court held that a violation of Rule 11 will support a collateral attack on a guilty plea even where there is neither constitutional error nor any showing of prejudice to the defendant. *Id.* at 375-377.

As previously noted, this Court reversed the Sixth Circuit's decision in a unanimous opinion authored by Mr. Justice Stevens. The gist of this Court's holding was that a violation of Rule 11 is neither constitutional nor jurisdictional. Moreover, the opinion went on to state that:

> Nor can any claim reasonably be made that the error here resulted in a "complete miscarriage of justice" or in a proceeding "inconsistent with the rudimentary demands of fair procedure." [*Hill* v. *United States,* 368 U.S. 424, 428 (1962).] Respondent does not argue that he was actually unaware of the special parole term or that, if he had been properly advised by the trial judge, he would not have pleaded guilty.

*United States* v. *Timmreck,* 441 U.S. at 784.

Similarly, neither of the petitioners in the instant case has alleged that had he been properly advised of the mandatory parole term he would not have pled guilty. (L. Williams, R. 1, p. 4; 0. Southall, R. 4, p. 4). Additionally, the combined prison and parole terms given to each respondent are within the maximum penalty which could have been assessed and the record reflects the respondents' awareness of this fact. *See*

*Williams I*, 447 F. Supp. at 100, 101. Indeed, even allowing for the time served upon reincarceration, respondent Southall was actually required to serve only twenty-three months of actual imprisonment as opposed to the maximum three year sentence which he was given by the trial court. (O. Southall, R. 6, Ex. A, pp. 2, 10)[3]

Petitioner is of course, aware of the fact that *Timmreck* was decided pursuant to federal statutory law (*i.e.*, 28 U.S.C. § 2255), while the decision in the instant case was grounded upon constitutional law. However, if the federal courts are not to grant collateral relief under § 2255, it stands to reason that they should refrain from imposing constitutional standards upon the states pursuant to 28 U.S.C. § 2254 where the issue in question is identical.

As Mr. Justice Stevens has noted:

> . . . the concern with finality served by the limitation on collateral attack has special force with respect to convictions based on guilty pleas.
>
> " 'Every inroad on the concept of finality undermines confidence in the integrity of our procedures; and, by increasing the volume of judicial work, inevitably delays and impairs the orderly administration of justice. The impact is greatest when new grounds for setting aside guilty pleas are approved because the vast majority of criminal convictions result from such pleas. Moreover, the concern that unfair procedures may have resulted in the conviction of an innocent defendant is only rarely raised by a petition to set aside a guilty plea.' "

*United States* v. *Timmreck, Id.* (Citation omitted).

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[3] Respondent Williams actually served approximately twenty-eight months in prison or only four months more than the maximum sentence which he was given. At least in Southall's situation it may well be that the Court of Appeals erred in applying the rule enunciated in *United States ex rel. Baker* v. *Finkbeiner*, 551 F.2d 180 (7th Cir. 1977), rather than that contained in *Bachner* v. *United States*, 517 F.2d 589, 597 (7th Cir. 1975).

It is, therefore, submitted that certiorari should be granted so that this Court can correct the Court of Appeals' failure to properly apply the holding of *United States* v. *Timmreck, supra,* to the instant Petitions. *See* Supreme Court Rule 17(1)(c). Moreover, it is submitted that using the *Timmreck* guidelines, neither of the respondents herein is entitled to federal habeas corpus relief.

## II.

## THE COURT OF APPEALS' DECISION IN *UNITED STATES ex rel. BAKER* V. *FINKBEINER* SHOULD NOT BE APPLIED RETROACTIVELY.

In *United States ex rel. Baker* v. *Finkbeiner,* 551 F.2d 180 (7th Cir. 1977), the Court of Appeals held that where a felony defendant is not informed of a mandatory parole term at the time he enters a guilty plea, the plea is "unfairly induced in violation of the Due Process Clause." *Id.* at 184. The opinion in that case went on to state that:

> [t]he difference between the three or four years in custody he [*i.e.,* the petitioner] did receive and the one to two years in custody he was told he would receive is substantial enough to justify a finding that he was unfairly compelled to accept the detrimental elements of his bargain without realizing its benefits. *Id.*

The Court of Appeals proceeded to release Baker from custody, reasoning that he had performed his part of the plea bargain (*i.e.,* imprisonment of up to two years) and the State, having had custody of Baker for some thirty-two months, must therefore perform its side of the bargain. *Id.*

Petitioner herein submits that the decision in *Baker* should be given prospective application only and should not have been applied to the instant guilty pleas which were entered long before *Baker* was decided or even the related Illinois Supreme Court case of *People* v. *Wills,* 61 Ill.2d 105, 330 N.E.2d 505 (1975).

A.

**_Wills_ Set Forth A New Rule Of Procedure—_Baker_ Raised It To A Constitutional Level.**

The State of Illinois adopted, in 1970, Supreme Court Rule 402 (*Ill. Rev. Stat.*, 1975, ch. 110A, § 402) which governs the procedure by which a plea of guilty is accepted in the state courts. Rule 402 requires that before any defendant may plead guilty to a charge he must be admonished of the constitutional rights which he waives by such a plea. As the Committee Comments to the rule make clear, this requirement was instituted to assure compliance with the decision of *Boykin* v. *Alabama*, 395 U.S. 238 (1968). Ill. Ann. Stat. ch. 110A, § 402 (Smith-Hurd) (Committee Comments).

Rule 402 has served its purpose, providing clear, on the record evidence of the knowing and voluntary nature of thousands of guilty pleas. Then, on January 1, 1973, the Illinois Mandatory Parole Act [*Ill. Rev. Stat.*, 1973, ch. 38, § 1005-8-1(e)] took effect, imposing terms of parole on all persons convicted of a felony, whether they were convicted at trial or by virtue of their own plea. Soon, several Illinois courts began receiving challenges similar to those involved in the case at bar, as the Illinois courts began to face the problem of whether Rule 402 admonitions were sufficient to assure the knowing and voluntary nature of a guilty plea. These challenges were squarely met and answered by the Illinois Supreme Court in its opinion in *People* v. *Wills, supra.*

In *Wills*, the Illinois Supreme Court reversed a lower court opinion holding the Mandatory Parole Act unconstitutional. The Court recognized that the Act may, in certain circumstances, be susceptible of unconstitutional application, but ruled that the law on its face was nevertheless valid. 330 N.E.2d at 507-8. In a supplemental opinion, the Court declined to rule that the absence of admonitions about mandatory parole would render a guilty plea invalid *per se*, and instead held that each

case should be judged on its own facts. However, to prevent further confusion among the Illinois trial courts, the Supreme Court ruled that from that date (*i.e.*, May 19, 1975) forward, admonitions must directly discuss mandatory parole. 330 N.E.2d at 508-9. This ruling was made in light of Petitions for Rehearing filed by both the State and the defendant which discussed the question of retroactivity. *Wills* thus set forth a new rule of criminal procedure designed to provide greater protection for future defendants.

Subsequently, however, in *United States ex rel. Baker* v. *Finkbeiner, supra,* decided on March 17, 1977, the Court of Appeals for the Seventh Circuit held that a failure to admonish a defendant concerning the mandatory parole term had the effect of rendering a guilty plea involuntary—in violation of the due process clause of the fourteenth amendment. In so holding, *Baker* reaffirmed the new rule of procedure announced in *Wills* but, in addition, raised it to constitutional status.

**B.**

**Only Procedures Which Affect The Integrity Of The Fact-Finding Process Should Automatically Be Applied Retroactively.**

Where a new rule of procedure has been established, this Court has provided full retroactivity, as a threshold matter, in situations where: 1) the new rule remedies a significant or a substantial defect in the fact-finding process at trial, a defect which raises serious questions about the accuracy of guilty verdicts in past trials, *Williams* v. *United States,* 401 U.S. 646, 653 (1971); *Bailey* v. *Holley,* 530 F.2d 169, 172 (7th Cir. 1976); and 2) where the new rule accords constitutional immunity to conduct which had previously been penalized. *Robinson* v. *Neil,* 409 U.S. 505, 509 (1971). Only the first situation is potentially applicable here.

Petitioner submits that the procedure by which a mandatory parole admonishment is, or is supposed to be, given, bears no relationship to the integrity of the fact-finding process of a criminal trial. As the rule announced in *Baker* concerns only the procedure in the guilty plea proceedings, it need not receive automatic retroactive application under the above-mentioned standard.

### C.

### *Baker* Should Not Be Applied Retroactively Under The Criteria Guiding Such An Application.

Assuming *Baker* is not entitled to automatic retroactive application, the next step which this Court must take to determine whether the decision should be applied retroactively involves a balancing process. This Court, in an opinion which, coincidently, held that new rules governing guilty pleas in federal courts should only be applied prospectively, described the criteria guiding resolution of the retroactivity question as involving: 1) the purpose of the new rule; 2) the extent of reliance upon the old rule; and 3) the effect retroactive application would have upon the administration of justice. *Halliday* v. *United States*, 394 U.S. 831, 832 (1968); *See Stoval* v. *Denno*, 388 U.S. 293, 297 (1967).

With respect to the first of these three criteria, it is clear that the main purpose of *Baker* is designed to assure that judges give on-the-record admonitions to defendants who plead guilty pursuant to a plea bargain, emphasizing the effect that the mandatory parole term has on their sentence. In holding that the lack of such an admonishment constituted a violation of due process, the District Court cited the case of *Boykin* v. *Alabama*, 395 U.S. 238 (1969).[4] *Boykin* provided that it was reversible

[4] The Court of Appeals, agreeing with both the reasoning and conclusion of the District Court on this issue, adopted that Court's opinion as its own. *United States ex rel. Williams* v. *Morris*, 633 F.2d at 77.

error for a trial court to accept a guilty plea without an affirmative showing, on-the-record, that the plea was made intelligently and voluntarily. *Boykin* has not been applied retroactively. *United States ex rel. Hughes* v. *Rundle*, 419 F.2d 116 (3rd Cir. 1969). Neither should *Baker*.

As for the second factor, Illinois trial courts quite properly relied upon Illinois Supreme Court Rule 402 as the complete standard which had to be met in accepting guilty pleas. These courts had been accepting guilty pleas with the justifiable belief that the Constitution was satisfied once a defendant was told of the constitutional rights he waived by pleading guilty. *Compare Boykin* v. *Alabama with Ill. Rev. Stat.* 1975, ch. 110A, § 402. No case law existed which would have foretold the result in *Baker*. No Illinois Supreme Court case prior to *Wills* dealt with the specific due process implications of mandatory parole. The first time the Illinois trial courts would have become aware of the requirement that defendants *must* be admonished concerning the mandatory parole term would have been on May 19, 1975, when the Illinois Supreme Court handed down its opinion in *Wills*.[5] There, the Court made clear its command that from that date forward full admonitions must be given, but specifically recognized, as this Court must as well, that there was a great deal of justified reliance upon Supreme Court Rule 402 throughout the Circuit Courts of Illinois and that the extent of this reliance weighed heavily against any attempt to fashion a retroactive rule governing past proceedings. 330 N.E.2d at 508-509; *See also People* v. *Irons*, 54 Ill. App. 3d 50, 369

[5] In particular, it must be noted that the Illinois Supreme Court, prior to *Wills*, had indicated that an admonishment as to the mandatory parole term need not be given to a defendant who wished to plead guilty. *People* v. *Krantz*, 58 Ill. 2d 187, 195, 317 N.E.2d 559 (1974). Illinois trial courts certainly were entitled to rely upon *Krantz* since it appeared to be "on all fours" regarding the question of admonishment as to the mandatory parole term.

Among the federal courts, no Seventh Circuit cases intimated that the rule in *Baker* was coming; indeed, if anything, the case law would have given the impression that the *Baker* case would be decided the other way. *Cf. Bachner* v. *United States, supra.*

N.E.2d 558, 560 (5th Dist. 1977). The interests of justice require that similar considerations should govern the effect to be given the *Baker* decision.

Finally, the effect a retroactive application would have on the administration of justice would be devastating since every felony plea accepted since the enactment of the mandatory parole term until March 17, 1977, could be questioned. *See Halliday* v. *United States,* 394 U.S. 831 (1968) [giving *McCarthy* v. *United States,* 394 U.S. 459 (1969), prospective application only].

The mandatory parole concept discussed in *Baker* took effect across the State of Illinois on January 1, 1973. On May 19, 1975, the Illinois Supreme Court's *Wills* opinion first set forth the requirement that admonitions must be given regarding the parole term. Therefore, if *Baker* were only to be given retroactive effect to those cases arising prior to the *Wills* decision, it could potentially apply to *all* negotiated felony guilty pleas entered throughout Illinois during 1973, 1974 and the first 20 weeks of 1975.[6] Illinois Courts' Administrative Office Statistics for one of these years, 1974, shows that 13,571 persons were convicted of felonies in Illinois. Of that number, over 90%, or 12,370 convictions, were obtained following a plea of guilty. This would mean that within that period, all prisoners whose pleas did not comport with *Baker's* guidelines could collaterally attack their convictions, unless the State moves quickly to void their mandatory parole terms—an act which is hardly conducive to promoting the legitimate public policy ends that the statute protects.

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[6] Since the Court of Appeals chose to make *Baker* fully retroactive, all felony guilty pleas entered between January 1, 1973 and March 17, 1977 (the day *Baker* was decided), are now open to collateral attack. Indeed, a class has already been certified in the pending case of *United States ex rel. Flowers* v. *Illinois Pardon & Parole Board,* No. 78 C 1000 (N.D. Ill.)

The other alternative, suggested by the District Court, is for the State to procure the transcript of the guilty plea in a given case, determine the terms of that plea, and adhere to those terms accordingly. *Williams I*, 447 F. Supp. at 107-108. The District Court, in so suggesting, assumes that there is a readily available state court transcript, from which the exact terms of the plea can be discerned.

There are two problems with this. A defendant who pleads guilty is not likely to have appealed his conviction; for example, neither of the respondents in the instant case has done so. Thus, in order to obtain the transcript in each case, the state must go to the clerk of each court in which the plea was accepted and order the plea proceedings to be transcribed. (It is not the custom to automatically transcribe such proceedings at the time guilty pleas occur, unless an appeal is sought.) Furthermore, once the transcript is found, the reviewing court must strictly scrutinize the nature of each admonishment given in *every* plea of guilty, to determine the sufficiency of the admonishment.

While respondents do not argue that the federal courts should not act on constitutional issues, this Court is urged to give recognition to the fact that the highest court in Illinois was squarely faced with the retroactivity issue in May of 1975, and that it found, using the same criteria that this Court must use, that the extent of reliance by the Illinois trial courts, and the burden which would face the judicial system, was too great to afford retroactive application of the rule requiring that defendants be warned of the mandatory parole term.

Given the foregoing considerations, it is respectfully submitted that certiorari be granted so as to allow this Court to review the Court of Appeals' erroneous and unjustified decision to apply its prior decision in *United States ex rel. Baker* v. *Finkbeiner, supra,* retroactively to the case at bar. *See* Supreme Court Rule I 17(1)(a).

## CONCLUSION

For the foregoing reasons, petitioner prays that this Court grant the instant Petition for Writ of Certiorari and, upon review, reverse that portion of the Court of Appeals' decision which granted habeas corpus relief to the respondents.

Respectfully submitted,

TYRONE C. FAHNER,
Attorney General,
State of Illinois,

MELBOURNE A. NOEL, JR.,

MICHAEL B. WEINSTEIN,
Assistant Attorneys General,
188 W. Randolph St.,
Suite 2200,
Chicago, Illinois 60601,
(312) 793-2570,
*Attorneys for Petitioner.*

# APPENDIX

In the

# United States Court of Appeals

## For the Seventh Circuit

No. 80-1296

UNITED STATES OF AMERICA ex rel. LAWRENCE WILLIAMS, OSCAR SOUTHALL and EMANUEL WILLIAMS,

*Petitioners-Appellees,*

*v.*

ERNEST MORRIS, Warden, Stateville Correctional Center; THADDEUS E. PINKNEY, Warden, Pontiac Correctional Center; and PEOPLE OF THE STATE OF ILLINOIS,

*Respondents-Appellants.*

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.
Nos. 77 C 2402, 77 C 2184 and 77 C 1937—**Prentice H. Marshall**, *Judge.*

ARGUED SEPTEMBER 16, 1980—DECIDED OCTOBER 22, 1980

Before CUMMINGS, SPRECHER and BAUER, *Circuit Judges.*

CUMMINGS, *Circuit Judge.* Petitioners, who pleaded guilty in their state court criminal prosecutions, sought writs of habeas corpus claiming that state judges violated petitioners' Fourteenth Amendment rights by failing to inform them that a mandatory three-year parole term would automatically attach to the sentences they were promised under plea agreements. The petitions were consolidated below, and District Judge Prentice Marshall, finding *United States* ex rel. *Baker v.*

*Finkbeiner*, 551 F.2d 180 (7th Cir. 1977), controlling, held that petitioners were entitled to relief. 447 F. Supp. 95 (N.D. Ill. 1978) (*Williams I*).

On appeal, this Court reversed, holding that petitioners had failed to exhaust an available state court remedy. 594 F.2d 614 (7th Cir. 1979).[1] Petitioners thereafter renewed their requests for expungement of their mandatory parole terms, contending that a subsequent Illinois Supreme Court decision showed conclusively that no state court remedy was available. Judge Marshall agreed and for the reasons set forth in *Williams I* granted the relief sought. 483 F. Supp. 776 (N.D. Ill. 1980) (*Williams II*). The State appeals on the merits.[2] We affirm in part and reverse in part.

I

*Lawrence Williams*

Petitioner Lawrence Williams pleaded guilty in the Circuit Court of Cook County on March 11, 1975, to a single charge of burglary, which at the time carried a penalty of one to twenty years imprisonment plus a mandatory three-year parole term. Ill. Rev. Stat. Ch. 38, §§ 119-1, 1105-8-1(b)(3), 1005-8-1(c)(3), 1005-8-1(e)(2). Under the terms of a plea agreement reached by Williams' public defender and the prosecutor, Williams was to

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[1] We also held that the petitions were not moot by reason of the fact that two of the petitioners had completed their entire sentence periods including the added parole term and the other had been discharged in compliance with the order of the district court because there remained collateral consequences which might have lingering effects since all three petitioners were found guilty of parole violations. 594 F.2d at 615. See *Carafas v. LaVelle*, 391 U.S. 234, 238-240; *Sibron v. New York*, 292 U.S. 40, 50-58.

[2] The State does not agree with Judge Marshall's conclusion on the exhaustion question but does not raise it on appeal because "none of the petitioners are presently in the custody of the Illinois Department of Corrections * * * [and] are, therefore, precluded, by Illinois law, from filing a post-conviction petition" (Br. 12).

receive an indeterminate sentence of one to two years in prison.

Before accepting the guilty plea, the trial judge admonished Williams of its consequences, elicited Williams' understanding and acceptance of the terms of the plea agreement, and indicated that the court would accept the recommended sentence. The judge then received Williams' acknowledgement that he understood the nature of the charges and his constitutional rights. A factual basis for the plea was established, and Williams indicated that he understood that by pleading guilty he admitted those facts. After advising Williams of the statutory penalty of one to 20 years imprisonment and hearing evidence in aggravation and mitigation of the offense, the trial judge sentenced Williams to not less than one nor more than two years in prison. The transcript contains no statement by the court, the prosecutor or the public defender that the recommended and actual sentence included a mandatory three-year parole term. Nor does the mandatory parole term appear on the sentencing order.

Williams completed his sentence on May 20, 1976, and was at that time released on parole. Williams claimed to have been unaware of the mandatory parole term until two months prior to his discharge. While serving the parole term, Williams was arrested on March 16, 1977, charged as a parole violator. He was reincarcerated at Stateville Correctional Center in Joliet, Illinois, on this charge when the Writ of Habeas Corpus was issued in *Williams I*. Before the denial of the State's Motion to Reconsider in *Williams I* took effect, Williams was released on a six months "mandatory supervisory release term" on February 1, 1978, pursuant to Ill. Rev. Stat. Ch. 38, § 1005-8-1. This revised law also had the effect of reducing Williams' parole term from three to two years. The period of mandatory release expired on August 1, 1978, at which time Williams was released from the custody of the Illinois Department of Corrections. He had been in the custody of the state for three years and four and one-half months, including 28 months in prison.

*Oscar Southall*

Petitioner Oscar Southall pleaded guilty in the Circuit Court of Cook County on March 19, 1975, to a single charge of burglary carrying the same penalty of one to 20 years followed by three years of mandatory parole. Pursuant to the plea agreement reached by his public defender and the prosecutor and ratified by the court, Southall was to receive an indeterminate sentence of one to two years in prison. The proceeding at which the trial judge accepted Southall's plea and sentenced him to one to two years in prison does not differ significantly from the above-described proceeding involving Lawrence Williams. Again, the transcript contains no statement by the prosecutor, the public defender or the trial judge that the recommended and actual sentences included a mandatory three year parole term. Again, the sentencing order contains no reference to a mandatory parole term.

Southall completed his sentence and was released on parole on September 22, 1975. He was declared a parole violator on October 8, 1976, and reincarcerated. He was subsequently re-paroled and eventually discharged from the custody of the Illinois Department of Corrections on October 24, 1979. Southall had been in the custody of the state for approximately four years and seven months, including 23 months in prison.

*Emanuel Williams*

Petitioner Emanuel Williams' case involves two guilty pleas. The first was entered on July 31, 1974, in the Circuit Court of Cook County to a charge of burglary carrying a penalty of one to 20 years imprisonment plus three years mandatory parole. Williams was sentenced in accordance with the prosecution's recommendation to one to three years in prison.[3] There is no indication in the

[3] It is not clear from the transcript whether the recommended and actual sentences were made pursuant to a plea agreement or not. Judge Marshall initially found that the adequacy of the first guilty plea was not ripe for summary judgment.

(Footnote continued on following page)

transcript of the proceedings at which the plea was entered and Williams was sentenced that he was informed by his attorney, the prosecutor or the court that he would be subject to a mandatory parole term. There is no reference to a mandatory parole term in the sentencing order.

Two days later, on August 2, 1974, Williams entered a guilty plea in the same court to a charge of theft which, because it involved more than $150, carried a penalty of one to ten years imprisonment and a mandatory three-year parole term. The guilty plea was entered pursuant to an agreement between Williams' attorney and the prosecutor calling for a recommended sentence of one to three years in prison. The trial judge, who was not the same judge as in the July 31 proceeding, accepted the prosecution's recommendation in sentencing Williams, but did not participate in or ratify the plea agreement prior to accepting Williams' plea. The judge also warned Williams that a mandatory parole term was included in the maximum sentence for the charge to which Williams sought to plead guilty. He was not told that a mandatory parole term attached to the prison term negotiated by his attorney and the prosecution.

As a result of the two guilty pleas, Williams was imprisoned to serve concurrent sentences of one to three years. He was released on parole on August 23, 1976, but was returned to prison on December 10, 1976, for a parole violation. Williams was released again (on a $5,000 recognizance bond) following the decision in *Williams I*. His sentence, including the statutory parole term, expired on September 17, 1978. Williams had been in the custody of the state for approximately four years and four and one-half months, including 27 months in prison.

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[3] *continued*
447 F. Supp. at 105. Subsequently, he must have determined that the plea was made pursuant to a plea bargain because his order granted the relief sought with respect to this plea (State's Br. at A 7). In any event, the State does not challenge the order with respect to this plea on the basis of the factual record.

II

In *United States* ex rel. *Baker v. Finkbeiner, supra*, this Court held that the failure to inform a state criminal defendant of a mandatory parole term accompanying his negotiated prison sentence violated the Due Process Clause of the Fourteenth Amendment. Baker had pleaded guilty to two criminal charges pursuant to a plea agreement ratified by the trial court under which he was told he would receive a sentence of one to two years in prison. He was never informed by his attorney, the prosecutor or the court that in actuality his sentence would include a mandatory two-year parole term. After his release from prison, Baker was arrested as a parole violator and reincarcerated. The district court denied his petition for collateral relief. This Court reversed, holding that the mandatory parole term constituted a substantial addition to the one to two years imprisonment Baker was promised and that therefore he had been deprived of the benefit of his plea bargain in violation of the Due Process Clause. We ordered the parole term expunged and Baker released from custody, reasoning that since Baker had performed his part of the bargain, the state should be held to its promise.

Before turning to the applicability of *Baker* to the petitioners here, we address the State's threshold argument that *Baker* must be overruled in light of *United States v. Timmreck*, ..... U.S. ....., 47 L.W. 4577. *Timmreck* involved a federal defendant who pleaded guilty on advice of counsel to a charge carrying a maximum penalty of 15 years in prison and a $25,000 fine plus a mandatory parole term of at least three years. In the Rule 11 (Fed. R. Crim. Pro.) proceeding, the district court judge properly advised defendant of the maximum prison term and fine but failed to inform him of the mandatory parole term. The judge accepted Timmreck's guilty plea and in a later proceeding sentenced him to ten years in prison plus a parole term of five years and a fine of $5,000. Timmreck neither objected to the sentence at the time it was pronounced nor appealed his conviction, but later moved to vacate the sentence on the ground that the trial judge had violated Rule 11 by

accepting the plea without admonishing him of the mandatory parole term. The Supreme Court, reversing the Sixth Circuit, held that a technical violation of Rule 11 resulting in no prejudice to the defendant and which could have been raised on direct appeal will not support collateral relief. In so doing, the Court expressly declined to decide whether collateral relief "would be available if a violation of Rule 11 occurred in the context of other aggravating circumstances." 47 L.W. at 4579. Cf. *Hill v. United States*, 368 U.S. 424.

We think it plain from the foregoing summaries that the holding in *Baker* is in no way inconsistent with that of *Timmreck*. Unlike *Timmreck*, *Baker* involved not merely a technical violation of proper procedure but a complete failure to inform the defendant at any time that he would in fact be in the custody of the state for a period of three to four years (including parole) rather than the one to two years he had been promised. Moreover, unlike Timmreck, whose combined prison and parole terms were within the maximum penalty he had been warned he could receive and who had never been promised less than the maximum, Baker was prejudiced in that he received a sentence calling for two years of custody (on parole) more than he had bargained for. In short, the two cases are not only not "on all fours" as the State acknowledges, but wholly different. We therefore find no cause to reexamine the decision in *Baker*.

## III

The State's first alternative argument is that even if *Baker* is still good law, it is not applicable on its facts to the guilty plea of petitioner Southall or the second guilty plea of petitioner Emanuel Williams.[4] With respect to Southall, the State contends that since he had bargained for as much as three years in prison and actually served

[4] The State concedes that Lawrence Williams' case is factually indistinguishable from *Baker* (Br. at 22). As noted, *supra* note 3, the State does not challenge the factual applicability of *Baker* to Emanuel Williams' guilty plea of July 31, 1974.

only 23 months, his case falls outside *Baker* and within *Bachner v. United States*, 517 F.2d 589 (7th Cir. 1975).

In *Bachner*, we held that the failure to inform a defendant of a mandatory parole term was not an error of constitutional magnitude where the sentence imposed did not exceed the maximum sentence the defendant was informed he would receive. What distinguishes *Bachner* from *Baker* is, first, that there was no plea agreement so that the defendant had no basis for expecting anything less than the maximum statutory sentence when he pleaded guilty and, second, that the sentence imposed including the mandatory parole term was within the maximum penalty defendant had been warned he could receive. Therefore, the defendant in *Bachner* was not prejudiced or deprived of the benefit of his plea bargain by the judge's failure to advise him of the mandatory parole term.

Southall's case is like *Baker*, not *Bachner*, in that Southall received a total sentence, including the three-year parole term, that exceeded the sentence he had bargained for and was promised. The State in effect asks us to ignore the additional parole term because Southall was actually incarcerated for less than the maximum three years of his negotiated plea. But, as we stated in *Baker*, "the conditions of parole place a number of onerous burdens on the liberty of paroled individuals," including the possibility of being returned to prison for technical parole violations. 551 F.2d at 184. While it is true that the defendant in *Baker* ended up spending 32 months in prison on a promised maximum sentence of two years imprisonment, it was the parole term itself with its concomitant burdens that we found to be a substantial addition to the negotiated sentence and not the additional time in prison resulting from the parole violation. In other words, a defendant does not have to violate his mandatory parole term and be reincarcerated for a total period in excess of the maximum negotiated sentence before he can object under *Baker* that the sentence imposed differed substantially from that which he was promised as an inducement to plead guilty. See *United States* ex rel. *Ferris v. Finkbeiner*, 551 F.2d 187 (7th Cir. 1977).

No. 80-1296

With respect to Emanuel Williams' guilty plea of August 2, 1974, the State argues that *Bachner* is controlling because the trial court was not a party to any plea agreement. We agree. Although the trial judge at the time of sentencing accepted the prosecution's recommendation for a sentence of one to three years imprisonment "as per agreement" (Pets. Br., App. B, at 8), the agreement referred to was one between Williams' attorney and the prosecutor only. Because the trial judge neither participated in nor ratified the agreement prior to accepting Williams' plea, it was not binding on the court. Moreover, the judge explicitly so warned the defendant:

> THE COURT: Mr. Orange, also known as Mr. Williams, although an agreement as to the penalty has been reached between your attorney and the State's Attorney, the Court is not bound to accept those terms; I could impose a lesser or a greater penalty in this case. Do you understand this?
>
> DEFENDANT: Yes, sir.
>
> THE COURT: Knowing that, do you still wish to plead guilty?
>
> DEFENDANT: Yes. (Pets. Br., App. B, at 7-8).

Thus like the defendant in *Bachner* and unlike the defendant in *Baker*, Emanuel Williams had no basis for expecting anything less than the statutory maximum. He was warned of this maximum, including the mandatory parole term. Judge Marshall found this warning insufficient for the purposes of informing Williams that a mandatory parole term would be part of the plea he had negotiated with the prosecutor because it was made in the context of the maximum sentence Williams could get under the law. Whether this finding was correct or, as the State contends, erroneous, we need not decide because there was no plea agreement binding on the court. Because the sentence imposed including the mandatory parole term was far less than the maximum period of imprisonment Williams was warned he could receive, he would not have been prejudiced even if the judge had failed to mention the parole term altogether.

Indeed, that would be the *Bachner* case. Accordingly, we reverse the order with respect to Emanuel Williams' guilty plea of August 2, 1974.

IV

With respect to petitioners Southall and Lawrence Williams, the State's alternative position is that *Baker* established a new and unexpected rule of law entitled only to prospective application and was therefore erroneously applied here to guilty pleas entered prior to March 17, 1977, the date *Baker* was decided. The State raised this issue for the first time on a Motion to Reconsider in *Williams I*. Judge Marshall rejected the argument on the grounds that *Baker* did not create a new and unexpected rule of law and that even if it had it would be entitled to retroactive application under the balancing test set forth in *Stovall v. Denno*, 388 U.S. 293. See 447 F. Supp. at 105-108. We agree with both the reasoning and conclusion of Judge Marshall's thorough opinion on this issue and therefore adopt it as our own.

The judgment is reversed with respect to the August 2, 1974, guilty plea of petitioner Emanuel Williams and in all other respects affirmed.

A true Copy:

Teste:

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*Clerk of the United States Court of Appeals for the Seventh Circuit*

FILED
AUG 17 1981
ALEXANDER L. STEVAS,
CLERK

No. 80-1240

# In the Supreme Court of the United States

OCTOBER TERM, 1980

MICHAEL P. LANE, Director,
Illinois Department of Corrections,
Petitioner,

v.

LAWRENCE WILLIAMS and
OSCAR SOUTHALL,
Respondents.

## ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

## JOINT APPENDIX

TYRONE C. FAHNER
Attorney General of the
State of Illinois

HERBERT L. CAPLAN
MELBOURNE A. NOEL, JR.
MICHAEL B. WEINSTEIN
Assistant Attorneys General
188 W. Randolph Street
Suite 2200
Chicago, Illinois 60601
(312) 793-2570

Counsel for Petitioner

MARTHA A. MILLS
Cotton, Watt, Jones,
King & Bowlus
One IBM Plaza
Suite 4750
Chicago, Illinois 60611
(312) 467-0590

Counsel for Respondents

PETITION FOR WRIT OF CERTIORARI FILED JANUARY 20, 1981.
CERTIORARI GRANTED JUNE 8, 1981.

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# LAWRENCE WILLIAMS

## CHRONOLOGICAL LIST OF RELEVANT DOCKET ENTRIES

### LAWRENCE WILLIAMS

July 6, 1977 — Received Petition for Writ of Habeas Corpus and 1 copy.

July 6, 1977 — Filed Civil Cover Sheet.

July 6, 1977 — Filed petition for leave to file and to proceed in forma pauperis.

July 6, 1977 — Filed petitioner's exhibit re: records from Cook County, Illinois.

July 11, 1977 — Enter order dated July 8, 1977: Enter order granting petitioner leave to proceed in forma pauperis. Respondent is ordered to answer or otherwise plead within 20 days.

July 11, 1977 — Filed Peittion for writ of habeas corpus and 1 copy.

July 22, 1977 — Filed respondent's motion to dismiss or for summary judgment with supporting memorandum; exhibit A.

August 8, 1977 — Filed petitioner's answer to respondent's motion to dismiss or for summary judgment with supporting memorandum.

August 31, 1977 — Filed Reply to Petitioner's Answer; Notice; Exhibits.

January 6, 1978 — Enter order dated January 4, 1978: For the reasons stated in the attached Memorandum Opinion, respondent's motion to dismiss is denied and judgment will enter declaring void the mandatory parole term imposed on Lawrence Williams in No. 74-3339 in the Circuit Court of Cook County, Illinois and respondent is ordered to

release Lawrence Williams forthwith. (DRAFT. See attached Memorandum Opinion.) MARSHALL, J.

January 6, 1978 — Enter judgment pursuant to Rule 58 — by the Clerk.

January 10, 1978 — Filed Respondent's Notice and Motion for stay.

January 12, 1978 — Enter order dated Janury 10, 1978: Respondent's motion for a stay of the order of Judge Marshall dated January 4, 1978, ordering the release of the petitioner is granted to and until January 16, 1978. Respondent's motion to reconsider shall be filed by or on January 13, 1978. Cause set for hearing on respondent's motion for stay before Judge Marshall on January 16, 1978 at 9:00 a.m. — FLAUM, J.

January 12, 1978 — Filed Respondent's Motion to reconsider with attachment and Notice of motion.

January 17, 1978 — Enter order dated January 16, 1978: Order of January 4, 1978 is stayed until further order of court. Cause set for ruling on January 25, 1978 at 9:30 a.m. — MARSHALL, J.

January 31, 1978 — Filed Appearance of Martha Jenkins as counsel for plaintiff and Affidavit.

January 31, 1978 — Enter order dated January 27, 1978: Enter order appointing Martha Jenkins to represent plaintiff under Criminal Justice Act. Cause set for status hearing on February 6, 1978 at 9:30 a.m. — MARSHALL, J.

January 31, 1978 — Filed Plaintiff's Notice of Motion and Motion for Consolidation.

January 31, 1978 — Filed Plaintiff's Notice of Motion and Motion for leave to file amendment to §2254.

February 2, 1978 — Enter order dated January 27, 1978: For the reasons stated in the attached Memorandum Opinion, we hold that *United States ex rel. Baker v. Finkbeiner* is to be given full retroactive effect. Respondent's motion to reconsider is denied. (DRAFT. See attached Memorandum Opinion.) — MARSHALL, J.

February 24, 1978 — Filed Respondent's Notice of Appeal.

April 30, 1979 — Filed April 30, 1979 Opinions Nos. 78-1321, 78-1322, 78 C [*sic*] 1323, 78-1380.

April 30, 1979 — Filed April 30, 1979 Certified copy of order from the U.S.C.A., 7th Cir. dated March 13, 1979: . . . It is ordered and adjudged by this court that the judgment of the said District Court in these causes appealed from be and the same are hereby, REVERSED and REMANDED with directions . . .(to dismiss the petition but with [*sic*] prejudice . . . .)

May 17, 1979 — Enter order dated May 17, 1979: Status hearing held. Case assigned to Judge Marshall's past case calendar until further order of court. — MARSHALL, J.

October 12, 1979 — Filed October 12, 1979 Plaintiff's Notice of Motion: and Motion for Ruling expunging terms of Mandatory parole for petitioners, with Exhibits A & B attached.

October 12, 1979 — Enter order dated October 12, 1979: Respondent to answer petitioner's motion for expunging terms of mandatory parole by October 26, 1979. Reply to answer to be filed by November 2, 1979. Ruling to be made by mail. — MARSHALL, J.

October 26, 1979 — Filed October 26, 1979 Response (of defendants [*sic*] ) to petitioners' motion for ruling expunging terms of mandatory parole for petitioners, and Notice.

November 2, 1979 — Filed November 2, 1979 Plaintiff's reply memorandun in support of petitioners' motion to expunge Mandatory Parole terms.

February 7, 1980 — Enter order dated February 1, 1980: For the reasons stated in the attached Memorandum Decision, we hold that the denial of leave to appeal in McCullim [*sic*], when considered with the precedent from the appellate courts, demonstrates anew the futility of a state remedy. Accordingly, judgment will enter expunging petitioners' mandatory parole terms. (DRAFT) MARSHALL, J.

February 8, 1980 — Enter order dated February 5, 1980: Judgment will enter declaring void the mandatory parole term imposed on Lawrence Williams in No. 74-3339 in the Circuit Court of Cook County, Illinois (DRAFT) MARSHALL, J.

February 27, 1980 — Filed February 26, 1980 Defendants' [*sic*] Motion to alter or amend the Judgment entered in the above entitled cases; Affidavit of Michael B. Weinstein; and Notice.

February 27, 1980 — Enter order dated February 26, 1980: Enter order granting respondent's motion to alter or amend in the above cases. — MARSHALL, J.

March 5, 1980 — Filed March 4, 1980 Defendant's [*sic*] Joint Notice of Appeal re: order of February 5, 1980.

March 5, 1980 — Forwarded March 5, 1980 Copy of Notice of Appeal, information sheet, and Copy of Docket to U.S.C.A., 7th Circuit.

November 25, 1980 — Filed certified copy of opinion and judgment of U.S.C.A., 7th Cir. dated October 22, 1980: It is ordered and adjudged by this Court that the judgment of the said District Court in this cause appealed from be, and the same is hereby, AFFIRMED IN PART [as to case numbers 77 C 2402 and 77 C 2184] AND REVERSED IN PART [as to case number 77 C 1937], in accordance with the opinion of this court filed this date.

PETITION FOR WRIT OF HABEAS CORPUS
UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS

PERSONS IN STATE CUSTODY

UNITED STATES OF AMERICA *ex rel.* LAWRENCE WILLIAMS,
Register #C-08051
Petitioner

Case No. 77 C 2402

-vs-

ERNEST MORRIS, Warden
Respondent

---

Instructions — Read Carefully

In order for this petition to receive consideration by the District Court, it shall be in writing (legibly handwritten or typewritten), signed by the petitioner and verified (notarized), and it shall set forth in concise form the answers to each applicable question. If necessary petitioner may finish his answer to a particular question on the reverse side of the page or on an additional blank page. Petitioner shall make it clear which question any such continued answer refers to.

Since every petition for habeas corpus must be sworn to under oath, any false statement of a material fact therein may serve as the basis of prosecution and conviction for perjury. Petitioners should, therefore, exercise care to assure that all answers are true and correct.

If the petition is taken *in forma pauperis*, it shall include an affidavit (attached at the back of the form) setting forth information which establishes that petitioner will be unable to pay the fee and costs of the habeas corpus proceedings. When the petition is completed, *the original and one copy* shall be mailed to the Clerk of the District Court for the Northern District of Illinois.

1) Place of detention: Stateville Correctional Center

2) Name and location of court which imposed sentence: Cook County Criminal Court, 2600 so. California, Chicago, Illinois.

3) The indictment number or numbers (if known) upon which, and the offense or offenses for which, sentence was imposed: 74-3339. Burglary

4) The date upon which sentence was imposed and the terms of the sentence:

   a) 11 March 1975 . . . one (1) year to two (2) years

   b) _____

   c) _____

5) Check whether finding of guilty was made

   a) after plea of guilty xxxxx

   b) after a plea of not/guilty _____

   c) after a plea of *nolo contendere* _____

6) If you were found guilty after a plea of not guilty, check whether that finding was made by:

   a) a jury _____

   b) a judge without a jury _____

7) Did you appeal from the judgment of conviction or the imposition of sentence? No.

8) If you answered "yes" to (7), list

   a) the name of each court to which you appealed:

      I. _____

      II. _____

      III. _____

III. _____

b) the result in each court to which you appealed:

I. _____

II. _____

III. _____

c) the date of each result:

I. _____

II. _____

III. _____

d) if known, citations of any written opinion or orders entered pursuant to such results:

I. _____

II. _____

III. _____

9) If you answered "no" to (7), state your reasons for not so appealing.

a) Because of guilty plea.

b)

10) State concisely the grounds on which you base your allegation that you are being held in custody unlawfully:

(a) The Petitioner is presently being held at the Stateville Correctional center in Joliet, Illinois, only pursuant to the so-called mandatory parole — Illinois Revised Statute Ch. 38, section 1005-8-1(e), and section 1003-3-9(a)(3)(i) which delineates the terms of recommitment under mandatory parole.

Petitioner is being held by the force of a 3-year mandatory parole term attached to the original sentence.

He has completed the maximun [*sic*] on his sentence, which he received as a result of guilty plea following plea bargaining sessions between Public Defenders, and the Illinois States Attorneys Office. The Petitioner was not advised that there would be an attached mandatory parole term to the original sentence.

Petitioner alleges that his present incarceration is therefore in violation of the Due Process Clause of the 14th Amendment to the U.S. Constitution, and of a right guaranteed by federal law pursuant to a Federal opinion in the 7th Circuit Court of Appeals: in *U.S.A. ex rel. Baker v. Finkbeiner*, No. 76-1918, decided March 17, 1977 before Circuit Judges Swygert, Tone & Wood, it was held that, given the circumstance of that petitioner's case, "... the failure of the prosecutor and the trial court to advise him of the mandatory parole term created a defect of constitutional dimensions in his guilty plea." (at p. 1 of the opinion).

(b)

(c)

11) State concisely and in the same order the facts which support each of the grounds set out in (10):

(a) Petitioner was arrested initially on 12/3/74 on a charge of burglary (see Exhibit 1 below). He remained in the Cook County Jail in Chicago untill [*sic*] 3/11/75 when he was given a sentence by Judge Phillip Romiti of one (1) year to two (2) years, under indictment # 74-3339 (see Exhibit 2). Petitioner accepted this sentence after plea bargaining between his Public Defender and the Sates [*sic*] Attorney. There was no mention of any madatory [*sic*] parole term, & this Petitioner was not informed that such a term was attached to his sentence untill [*sic*] apprpximately [*sic*] two months before his discharge date of 5/20/76.

While serving this mandatory parole term Petitioner was arrested on 3/3/77 on a charge that was later dismissed. Without any type of hearing concerning this mandatory parole Petitioner was sent to the Joliet Diagnostic Center, and then to the Stateville Correctional Center where he is now being held. Petitioner has serve the maximun [*sic*] on the one to two [*sic*].

Petitioner has attemped [*sic*] to obtain proof of his allegation that he was, at sentencing hearing alluded to in the foregoing Petition, not advised about an attached mandatory parole term, but he has been unable to obtain his transcripts of the sentencing hearing.

Petitioner requests, pursuant to 28 U.S.C.A. 2249, that the Court order Respondents to forward the transcripts, since in his incarerated [*sic*] state he can do no more than he has already done.

WHEREFORE Petitioner Lawrence Williams prays that this honorable Court grant him the following relief:

1. An order freeing him from the present control of Warden Morris, and all future liability under the sentence mentioned in the foregoing Petition;

2. An order to Respondent Morris, that he produce the Petitioner at any hearing(s) held by the Court on this issue;

3. An order that responsibility for proof in this issue be shifted to the Respondents, that they be required to forward to the Court this Petitioner's sentencing hearing transcripts;

4. Any further relief that Court deems appropriate and just in this natter [*sic*].

(b)

(c)

12) Prior to this petition have you filed with respect to this conviction:

(a) any petition in a state court under the Illinois Post-Conviction Hearing Act, Ill. Rev. Stat. ch. 38, sec. 122? no.

(b) any petition in a state court by way of statutory *coram nobis*. Ill. Rev. Stat. ch. 110, sec. 72? no.

(c) any petitions in state or federal courts for habeas corpus? no.

(d) any petitions in the United States Supreme Court for certiorari other than petitions, if any, already specified in (8)? no.

(e) any other petitions, motions or applications in this or any other court? no.

13) If you answered "yes" to any part of (12), list with respect to each petition, motion or application:

a) the specific nature thereof:

i. _____

ii. _____

iii. _____

iv. _____

b) the name and location of the court in which each was filed:

i. _____

ii. _____

iii. _____

iv. _____

c) the disposition thereof:

i. _____

ii. _____

iii. _____

iv. _____

d) the date of each such disposition:

i. _____

ii. _____

iii. _____

iv. _____

e) if known, citations of any written opinions or orders entered pursuant to each such disposition:

i. _____

ii. _____

iii. _____

iv. _____

14) Has any ground set forth in (10) been previously presented to this or any other court, state or federal, in any petition, motion or application which you have filed? no.

15) If you answered "yes" to (14), identify:

(a) which grounds have been previously presented:

i. _____

ii. _____

iii. _____

(b) the proceedings in which each ground was raised:

i. _____

ii. _____

iii. _____

16) If any ground set forth in (10) has not previously been presented to any court, state or federal, set forth the ground and state concisely the reasons why such ground has not previously been presented:

(a) Petitioner brings this Petition before this Court because there is no remedy at state level: Scott v. Israel 361 N.E.2d 1108

(b)

(c)

17) Were you represented by an attorney at any time during the course of

(a) your arraignment and plea? Yes.

(b) your trial, if any? Yes.

(c) your sentencing? Yes.

(d) your appeal, if any, from the judgment of conviction or the imposition of sentence? XXXXXX

(e) preparation, presentation or consideration of any petitions, motions or applications with respect to this conviction which you filed? XXXXXX

18) If you answered "yes" to one or more parts of (17), list

(a) the name and address of each attorney who represented you:

i. Public Defender

ii. Public Defender Office

iii. Public Defender

(b) the proceedings at which each such attorney represented you:

i. Same as above.

ii. _____

iii. _____

In Forma Pauperis Affidavit

(see instructions, page 1 of this form)

/s/ Lawrence Williams
Signature of Affiant

)
) ss
)

/s/ Lawrence Williams, being first sworn under oath, presents that he has subscribed to the above and does state that the information therein is true and correct to the best of his knowledge and belief.

/s/ Lawrence Williams
Signature of Affiant

SUBSCRIBED AND SWORN to
before me this 30th day
of June, 1977.

/s/ Dennis R. Math
Notary Public

My commission expires

Nov. 16, 1980

OFFICE OF THE STATE'S ATTORNEY
COOK COUNTY, ILLINOIS
CHICAGO 60608

BERNARD CAREY
STATE'S ATTORNEY

CRIMINAL DIVISION
2600 SOUTH CALIFORNIA AVENUE

March 14, 1975

DEFENDANT: Lawrence Williams AGE: 36

| INDICTMENT NO. | CHARGE | SENTENCE |
|---|---|---|
| 74-3339 | Burglary | 1 to 2 yrs., I.S.P. NEW CODE |

STATE'S RECOMMENDATION: SAME

JUDGE: Philip Romiti

DATE SENTENCED: March 11, 1975

TYPE OF TRIAL: Plea of Guilty

REPRESENTED BY: Ronald Menaker, Assistant Public Defender

COMPLAINING WITNESS: John Tacneau
5039 S. Prairie
Chicago, Illinois

ARRESTING OFFICERS: Off. James Sunberg #7961
2nd District
Chicago Police Department

ASSISTANT STATE'S ATTORNEY:
Charles B. Burch

IN RE: LAWRENCE WILLIAMS
INDICTMENT NO. 74-3339

OFFICIAL STATEMENT OF FACTS

The facts in this Indictment are briefly as follows:

On June 20, 1973 at 6:30 a.m., the arresting officer responded to a burglary alarm at the tavern located at 5059 S. Prairie. The officer found the defendant sitting in a booth with a bag of money next to him. The rear bathroom window had been broken and the coin-operated machines had been damaged.

BERNARD CAREY
State's Attorney

By: /s/ Charles B. Burch
Assistant State's Attorney

CBB:va

---

STATE OF ILLINOIS )
COUNTY OF COOK ) ss.

The JUNE , 1974 Grand Jury of the Circuit Court of Cook County.

79506

The Grand Jurors chosen, selected, and sworn, in and for the County of Cook, in the State of Illinois in the name and by the authority of the People of the State of Illinois, upon their oaths present that on June 20th., 1973 at and within said County

Lawrence Williams

RECEIVED AT DIAGNOSTIC DEPOT
JOLIET MAR 14 1975

committed the offense of burglary

in that he, without authority, knowingly entered into a building, to wit: tavern of John S. Tacneau with the intent to commit the crime of theft therein, in violation of Chapter 38, Section 19-1, of the Illinois Revised Statutes 1971, contrary to the statute, and against the peace and dignity of the same People of the State of Illinois.

/s/ Bernard Carey
State's Attorney

(Back of Indictment omitted in printing)

MORGAN M. FINLEY CLERK OF THE
CIRCUIT COURT COOK COUNTY

Mittimus Imprisonment In A State Penal Institution

---

UNITED STATES OF AMERICA

IN THE CIRCUIT COURT OF COOK COUNTY ILLINOIS
COUNTY DEPT. CRIMINAL DIV./DISTR.

Proceedings and Judgments before the Circuit Court of Cook, County Illinois

2600 S. CALIFORNIA, Illinois, Branch ____ on 3/11/75

Present: Honorable PHILIP ROMITI
One of the Judges of the Circuit Court of Cook County

MORGAN M. FINLEY, CLERK
BERNARD CAREY, State's Attorney
RICHARD J. ELROD, Sheriff

---

THE PEOPLE OF THE STATE OF ILLINOIS Indictment or Case
(Plaintifff) #74-3339

LAWRENCE WILLIAMS Burglary
(Defendant)

Charge: Chapter 38 Section 19 Paragraph 1 of the Illinois Revised Statutes

The Offense of BURGLARY, IN MANNER AND FORM AS CHARGED IN THE INDICTMENT.

---

The defendant WAS represented by an attorney.

The Court adjudged defendant guilty on the PLEA.

The following sentence IS NOT a condition of probation

ADULT DIVISION:

BECAUSE OF THE JUDGMENT OF GUILTY IT IS ORDERED THAT THE DEFENDANT LAWRENCE WILLIAMS is sentenced for the INDEFINITE TERM XXXXX or the term of not less than ONE YEAR nor more than TWO YEARS and committed to the custody of the Adult Division of the Department of Corrections for confinement in the ILLINOIS DEPARTMENT OF CORRECTIONS

* * *

THE SHERIFF OF COOK COUNTY is commanded to take the defendant LAWRENCE WILLIAMS into his custody and deliver (him)(her) to the aforesaid Department of Corrections.

THE DEPARTMENT OF CORRECTIONS is commanded to take the defendant LAWRENCE WILLIAMS and confine (him)(her) in the manner provided by law until the above sentence is fulfilled.

---

(Clerk's Certification omitted in printing)

(Back of mittimus omitted in printing)

EXHIBIT A

STATE OF ILLINOIS )
) ss.
COUNTY OF COOK )

IN THE CIRCUIT COURT OF COOK COUNTY
COUNTY DEPARTMENT – CRIMINAL DIVISION

| | | |
|---|---|---|
| THE PEOPLE OF THE STATE OF ILLINOIS | ) | |
| vs. | ) | Indictment No. 74-3339 |
| | ) | Charge: Burglary |
| LAWRENCE WILLIAMS | ) | |

CHANGE OF PLEA

REPORT OF PROCEEDINGS had pursuant to the provisions of Chapter 38, Article 115-2, Illinois Revised Statutes, before the Honorable PHILIP ROMITI, Judge of the Criminal Division, on the 11th Day of March, A.D. 1975.

APPEARANCES:

HON. C. BERNARD CAREY,
State's Attorney of Cook County, by
MR. CHARLES B. BURCH and
MR. NICHOLAS DE JOHN,
Assistant State's Attorneys,
appeared for the People;

MR. JAMES J. DOHERTY,
Public Defender of Cook County, by

MR. RONALD MENAKER,
Assistant Public Defender,
appeared for the Defendant.

[2] THE CLERK: Lawrence Williams.

MR. MENAKER: Judge, Lawrence Williams is before the Court on Indictment 74-3339. I believe this matter last time was up I requested a conference and am now requesting a conference this morning.

THE COURT: Have you had a dialog with the defendant?

MR. MENAKER: I believe we have.

THE COURT: We talked to you about whether you wanted Mr. Menaker to discuss the case with the State to see if they could dispose of it without trial and you had agreed to that, had you not?

THE DEFENDANT: Yes, Your Honor.

THE COURT: We will pass it and you can continue your conference.

(After an interval of time, the following proceedings were had:)

THE CLERK: Lawrence Williams.

MR. MENAKER: Judge, may the record reflect that Lawrence Williams is before the Court pursuant to Indictment 74-3339 alleging the offense of burglary.

I have had an opportunity not only today but on other occasions to confer with Mr. Burch of the State's Attorney's office and with my client Mr. Williams and at this time after I have informed the [3] Court and the Court has in fact been a party to this conference pursuant to the recommendation being made by Mr. Burch, Mr. Williams now is asking leave of court to withdraw his previously entered plea of not guilty and enter a plea of guilty thereto.

THE COURT: Q All right. Mr. Williams, before we proceed any further let me ask you whether you understand

and appreciate that under the 5th Amendment of the Constitution that you have a right to remain silent and not to say anything at all which would in any way tend to incriminate you, you understand that?

A Yes, Your Honor.

Q Mr. Menaker indicates to me that you are prepared to or that you wish to withdraw your plea of not guilty which you had entered to Indictment 74-3339 and to enter a plea of guilty on that indictment, is that correct?

A Yes, Your Honor.

Q And further it is my understanding from what Mr. Menaker said and indeed the record will obviously reflect there is a change of plea which is based upon certain discussions that were had by Mr. Menaker and Mr. Burch and after they had their discussions they advised the Court as to what their agreements were and [4] it is based upon those recommendations or those discussions and agreements that you now indicate you wish to change your plea, is that correct?

A Yes, Your Honor.

THE COURT: Mr. Burch, would you put the gist of the conference on the record, please.

MR. BURCH: Yes, I will, Judge. I believe I talked with Mr. Menaker several times about this case. We have discussed Lawrence Williams and his background. We have also discussed the case and having discussed all those things I indicated to Mr. Menaker I believe in the last court date that the State would be willing to recommend a period of not less than one nor more than two years in the Illinois State Penitentiary if Mr. Lawrence Williams pleads guilty.

THE COURT: Mr.Menaker, is that your understanding and agreement?

MR. MENAKER: Yes.

THE COURT: Q Mr. Williams, after those conversations had taken place did Mr. Menaker then talk to you?

A Yes, Your Honor.

Q Did he tell you what agreement he had reached, the State was going to recommend or that the agreement was that upon a plea of guilty they would be recommending [5] to the Court a sentence of not less than one year nor more than two years?

A Yes, Your Honor.

Q The Court was told that and the Court indicated and will indicate to you now that conditionally it would accept the recommendation. By that I mean I would accept it unless I were to hear something during the course of these proceedings that I have had no notice of at all which might cause me to change my mind and if that were to happen then of course you would be permitted to withdraw your plea of guilty, you understand?

A Yes, sir.

Q Now you understand, sir, that you need not change your plea if you don't want to, that you can continue to plead not guilty?

A Yes, sir.

Q And you are changing it because you find the agreement is acceptable to you?

A Yes, Your Honor.

Q Now Indictment 74-3339 charges that on June 20th of 1973 that Lawrence Williams committed the offense of burglary in that he without authority knowingly entered into the building, to-wit the tavern of John Stacneau, S-t-a-c-n-e-a-u, with the intent to commit [6] therein the crime of theft in violation of Chapter 38, Section 19-1 of the Illinois Revised Statutes of 1973. Do you understand the charge?

A Yes.

Q And it is to this indictment and to this charge then that you now indicate that you wish to plead guilty?

A Yes, Your Honor.

Q You do understand, do you, Mr. Williams, that the State has the burden in a criminal case to prove a person guilty beyond a reasonable doubt, you understand that?

A Yes, Your Honor.

Q And you understand, do you, that when you plead guilty to the indictment, to the charge that you relieve the State of that burden, they no longer have to prove you guilty beyond a reasonable doubt, you understand that?

A Yes, Your Honor.

Q And also Mr. Williams you understand that our Constitution provides that whenever a person is charged with a crime that he has a right to a trial by jury, you understand that?

A Yes, Your Honor.

Q And what does a jury trial mean to you? What is your understanding of a jury trial?

[7] A That if I am found guilty, Your Honor, that I can be sentenced to a maximum –

Q But what is your understanding of a jury trial or a trial by jury?

MR. MENAKER: Do you know what 12 people sitting in a box is?

THE DEFENDANT: Yes.

MR. MENAKER: You understand?

THE COURT: Q You understand that what we are talking about is you would have a right to have 12 people picked and those 12 people would then sit in the jury box that you see in the court room and they would listen to the witnesses and they testify and then they would decide your innocence or guilt, you understand that?

A Yes.

Q And do you understand that when you plead guilty to the indictment that you would be waiving or giving up that right to a jury trial?

A Yes, Your Honor.

Q I'm going to hand to Mr. Menaker a form which is entitled Jury Waiver and it reads, "I, the undersigned, do hereby waive jury trial and submit the above entitled cause to

the Court for hearing." If that is what you want if you would sign that, please, after Mr. Menaker [8] gives it to you.

All right, Mr. Clerk, waiver of jury may be filed.

Q You understand that one could waive or give up this right to a jury trial that we just talked about?

A Yes, sir.

Q And then decide to have this case heard in what we call a bench trial, you understand that?

A Yes, sir.

Q You understand what a bench trial is as distinguished from a jury trial?

A Yes, Your Honor.

Q What does that mean?

A Like now.

Q Well, except it's like now except that witnesses would be coming in and a Judge instead of a jury would listen to the witnesses and then the Judge instead of a jury would decide your innocence or guilt.

A Yes, sir.

Q But you understand you would be giving up that right also?

A Yes, Your Honor.

Q What I'm trying to find out is whether you understand, Mr. Williams, that when you plead guilty [9] to an indictment or you plead guilty to the charge that there is not going to be a jury trial or a bench trial or any kind of trial, there is not going to be any trial at all, you understand that?

A Yes.

Q There would be no witnesses coming in, there won't be any trial at all, right?

A Right.

Q Another right which a person has once he is charged with a crime is a right that we refer to or we call confrontation. Now that means, Mr. Williams, that you would have a right to have those witnesses against you come into this court

room and you would have a right to face those witnesses, have them sworn and take the witness stand and testify and then you would have a right to cross examine those witnesses, you understand?

A Yes, sir.

Q So that those witnesses that Mr. Burch had indicated — I don't think I asked you to do it or he will indicate who would come in and testify in a certain way that they would, you would have a right to have those witnesses come in and to testify and to have the witnesses against you testify and then cross [10] examine the witnesses, right?

A Right.

Q And having said that it might be a good point for me to ask Mr. Burch to inform the Court as to the facts out of which the indictment arose and perhaps as to what the witnesses would testify were they called.

MR. BURCH: Judge, I believe there will be a stipulation by and between the parties in this matter, Mr. Lawrence Williams, through his attorney, Mr. Ron Menaker in this court room and the People of the State of Illinois by and through the Assistant State's Attorney in this court room, Charles B. Burch, that on the 20th of June, 1973, at approximately 6:30 A.M. at the address of 5059 South Prairie which is in the City of Chicago, Cook County, State of Illinois, that Officer James Sunberg and his partner Officer Hile, H-i-l-e, they were called to that location at 5059 South Prairie in the City of Chicago over their radio and the call was a burglary in progress.

They went to that location and at that time they found Lawrence Williams sitting in a booth in the premises there which was I believe a tavern. Next to him on the floor was a bag which was full of an amount of United States currency, approximately $172.00 [11] in nickels, dimes and quarters.

The officers examined at that time various machines and places which would have money in them and found that

several coin boxes including the cigarette machine had been broken into and the coins removed. At that time Mr. Lawrence Williams was placed under arrest and brought into the station for processing.

Judge, if Mr. John C. Stacneau who was the manager and part owner of the store-tavern at 5059 South Prairie in the City of Chicago were called to testify he would testify if called that he is indeed the manager and part owner of the premises there, that this is an establishment which sells liquor and other items.

He would further testify that the establishment was closed at 6:30 A.M. in the morning on that date, June 20th, 1973, and he did not give permission to Mr. Lawrence Williams to enter the premises nor to take any money or any other items from the premises at that time. So stipulated, counsel?

MR. MENAKER: So stipulated.

MR. BURCH: Could we have a stipulation as to Mr. Williams age?

MR. MENAKER: 37 years old.

[12] MR. BURCH: So stipulated Mr. Williams is 37 years, Judge. May we have a stipulation that the indictment is true and correct and sufficient in law and in fact to support a finding of guilty of the charge of burglary?

MR. MENAKER: So stipulated.

THE COURT: All right, Mr. Williams, you understand then as we started to say earlier that the witnesses that Mr. Burch indicated would testify in a certain way that you would have a right to have those witnesses come in and have those witnesses cross examined, you understand that?

A Yes.

Q You understand you would be giving up that right also?

A Yes, Your Honor.

Q And you understand that when you plead guilty to the indictment that you admit the charge in the indictment, the facts as they relate to that charge as they were just recited by Mr. Burch?

A Yes.

Q Before we go any further let me advise you as to the penalty which the statute provides for the offense of burglary.

The Code of Corrections provides that upon a [13] finding of guilty of burglary that you could be sentenced to the penitentiary for a period of not less than one year nor more than twenty years or any number of years between one and twenty and a $10,000 fine. Do you understand that?

A Yes.

Q I think you have already indicated that you had complete understanding of the conference that Mr. Menaker had with Mr. Burch and the agreements that they have arrived at?

A Yes, Your Honor.

Q Is there anything at all, Mr. Williams, now after we have gone over these various rights that an individual has once he is charged with an offense, anything about those rights that you now feel that you don't understand and that you might want either Mr. Menaker or myself to explain further?

A No, Your Honor.

Q I take it then that you have told me that you understand that when you plead guilty to the indictment you admit the charge and the facts as they relate to the charges as they were recited to me?

A Yes, Your Honor.

Q And you understand that by pleading guilty you [14] are giving up your right to a jury trial, a bench trial or any kind of trial, is that correct?

A Yes, Your Honor.

Q And that by pleading guilty you are waiving your right to cross examine the witnesses, your right to testify for yourself if you wish to or your right to call any witness to testify for you?

A Yes, Your Honor.

Q And you understand the penalty and you understand the agreement?

A Yes, Your Honor.

Q And you understand that you need not change your plea if you don't wish to but you can continue to plead not guilty?

A Yes, sir.

Q Understanding all of these things then do you still wish to plead guilty?

A Yes.

THE COURT: Let the record show that the defendant has been advised of the consequences of his plea and after having been so advised he persists therein. The plea, therefore, will be accepted and there will be a finding of guilty of burglary in manner and form as charged in Indictment 74-3339 and there will be a judgment [15] on that finding.

Q Mr. Williams, the Code of Corrections provides that before the Court proceeds with any sentencing that a defendant has a right to have what we call a pre-sentence investigation and pre-sentence report. That means that certain information would be gotten from you concerning your background, your social background, your educational background, your work background, general history and an investigation would be conducted based on the information they receive from you and then they would prepare a written report.

Now we would get a copy of that written report and we would use that for whatever help it might be to us in arriving at what we feel would be a proper sentence in the case. Do you understand that?

A Yes, Your Honor.

Q That is a right, of course, like any other right which a person has which can be waived if he wishes to and I ask you what your position is in that area.

MR. MENAKER: May I have a moment, Judge?

THE COURT: Yes.

THE DEFENDANT: I will waive it, Your Honor.

THE COURT: I am going to for the record then give to Mr. Menaker a form that I'm going to ask you to sign [16] if that is your wish and it simply reads: "I, the undersigned, do hereby waive my right to the pre-sentence investigation and written report."

MR. MENAKER: Here, Your Honor.

THE COURT: Waiver of pre-sentence report will be filed. Aggravation and mitigation.

MR. BURCH: Judge, I believe Your Honor is aware of the facts as I read them in the record as far as the basis of this particular charge.

Mr. Williams does have a history of criminal convictions including the 10th of October, 1972, pleading guilty to an attempt theft. He received a year to a year and a day from Judge Garippo. We would limit our aggravation to that, Judge. I simply state taking into account the fact this was a commercial rather than a domicile of an individual or home of an individual I think it was probably the factor which most weighed on my mind in terms of the light sentence which I thought Mr. Williams was receiving.

However, we took into account the fact that it was a commercial premises rather than a home and I believe that was the reason why I recommended the one to two years.

THE COURT: Mr. Menaker.

[17] MR. MENAKER: May I have Mr. Williams sworn, please?

THE COURT: Yes.

LAWRENCE WILLIAMS

the defendant herein, called on his own behalf, having been first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. MENAKER:

Q Would you kindly state your name, please, and speak loud so myself and the Judge and the court reporter can hear you?

A Lawrence Williams.

Q Mr. Williams, you are 37 years old, is that correct?

A Yes.

Q And you are the defendant in this matter, are you not?

A Yes.

Q Mr. Williams, prior to your arrest in this matter were you working?

A Yes, part time.

Q And would you tell the Court where you were working?

A Williams restaurant.

[18] Q Where is Williams restaurant located?

A 437 West 63rd Street.

Q And what were your responsibilities and duties at the restaurant?

A Part time cook.

Q For how long a period had you been doing that?

A About three years.

Q Mr. Williams, are you single or married?

A Single.

Q Do you support a family of any nature?

A I have a daughter.

Q How old is your daughter?

A Eight years old.

Q Mr. Williams, how much education have you had?

A 12 years.

Q And you are a high school graduate?

A Yes.

Q Is that in the City of Chicago?

A Yes.

Q What high school did you attend?

A Du Sable.

Q Did you have any education after high school in any way, trade or college or anything of that nature?

A No.

[19] Q Have you ever served in the armed forces?

A No.

MR. MENAKER: Judge, that would be the extent of mitigation. I would ask in view of the circumstances to abide or consider the State's recommendation.

THE COURT: Q Mr. Williams, is there anything that you would like to add or anything you would like to say to the Court?

A No, Your Honor.

THE COURT: All right. The Court certainly has heard nothing during the course of these proceedings which would be different from what had been advised earlier in the conference and the Court can accept the agreement entered into between the State and the defense counsel.

Accordingly, Lawrence Williams, it is the sentence of this Court that you be confined to the penitentiary for a period of not less than one year nor more than two years and you are hereby remanded to the custody of the Illinois Department of Corrections.

MR. MENAKER: Judge, may I address myself on one further point?

THE COURT: Yes.

MR. MENAKER: A review of the half sheet indicates there has been a bond forfeiture resulting from Mr. [20] Williams incarceration pending this disposition. Mr. Williams has asked me the possibility of this Court considering — there has been a transfer of funds and judgment. Would the Court if appropriate motions were filed consider in any way reinstating that bail and allowing him to have the funds?

THE COURT: The Court's position has been that once there has been a judgment entered and a transfer of funds then properly that matter should be taken up before the Presiding Judge.

MR. MENAKER: Judge Power?

THE COURT: Yes.

(Which were all of the proceedings had upon the above entitled change of plea.)

(Court reporter's certificate omitted in printing)

UNITED STATES DISTRICT COURT,
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

Honorable Prentice H. Marshall

No. 77 C 2402 January 4, 1978

UNITED STATES OF AMERICA
*ex rel.* LAWRENCE WILLIAMS

v.

ERNEST MORRIS, Warden

Order

* * *

For the reasons stated in the attached memorandum opinion, respondent's motion to dismiss is denied and judgment will enter declaring void the mandatory parole term imposed on Lawrence Williams in No. 74-3339 in the Circuit Court of Cook County, Illinois and respondent is ordered to release Lawrence Williams forthwith.

(DRAFT. See attached Memorandum Opinion.)

UNITED STATES DISTRICT COURT
FOR THE
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

Civil Action File No. 77 C 2402

U.S.A. ex rel. LAWRENCE WILLIAMS )
) JUDGMENT
vs. )
)
ERNEST MORRIS

This action came on for (hearing) before the Court, Honorable Prentice H. Marshall, United States District Judge, presiding, and the issues having been duly (heard) and a decision having been duly rendered,

It is Ordered and Adjudged respondent's motion to dismiss is denied and judgment will enter delcaring [*sic*] void the mandatory parole term imposed on Lawrence Williams in No. 74-3339 in the Circuit Court of Cook County, Illinois and respondent is ordered to release Lawrence Williams forthwith.

Dated at Chicago, Illinois, this 4th day of January, 1978.

H. STUART CUNNINGHAM
Clerk of Court

By: /s/ Rita L. Dumas
Deputy Clerk

(Title omitted in printing)

MOTION FOR CONSOLIDATION

Petitioners in each of the three above captioned cases, by their counsel, move this Court for an Order pursuant to Rule

42(a) consolidating the cases for purposes of further proceedings herein as there are no questions of fact, but there are issues of law common to the three cases.

Respectfully submitted,

/s/ Martha M. Jenkins
77 W. Washington Street
Chicago, Illinois 60602
Attorney for Petitioners

(Notice of Motion and Certificate of Service omitted in printing)

(Title omitted in printing)

NOTICE OF APPEAL

Notice is hereby given that respondents hereby appeal to the United States Court of Appeals for the Seventh Circuit from an order of January 4, 1978 entered herein granting a writ of *habeas corpus* and from the final order of January 27, 1978, entered herein denying respondent's motion to reconsider.

Respectfully submitted,

WILLIAM J. SCOTT
Attorney General
State of Illinois

By: /s/ Patrick J. Calihan
Assistant Attorney General
188 W. Randolph St., Suite 2200
Chicago, Illinois 60601
(312) 793-2570

(Notice and affidavit of service omitted in printing)

UNITED STATES DISTRICT COURT,
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

Honorable Prentice H. Marshall

Feb. 5, 1980

Lawrence Williams v. Ernest Morris

Judgment Order

* * *

Judgment will enter declaring void the mandatory parole term imposed on Lawrence Williams in No. 74-3339 in the Circuit Court of Cook County, Illinois. Draft

IN THE
UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

UNITED STATES OF AMERICA ex rel.
LAWRENCE WILLIAMS,
Petitioner,

v. No. 77 C 2402

ERNEST MORRIS, Warden,
Respondent.

UNITED STATES OF AMERICA ex rel.
OSCAR SOUTHALL,
Petitioner,

v. No. 77 C 2184

THADDEUS E. PINKNEY, Warden, Pontiac Correctional Center,
Respondent.

UNITED STATES OF AMERICA ex rel.
EMANUEL WILLIAMS,
Petitioner,
v. No. 77 C 1937

PEOPLE OF THE STATE OF ILLINOIS,
Respondents.

JUDGMENT

In 77 C 2402, United States of America ex rel. *Lawrence Williams v. Ernest Morris*, Warden, judgment will enter declaring void the mandatory parole term imposed on Lawrence Williams in No. 74-3339 in the Circuit Court of Cook County, Illinois.

In 77 C 2184, United States of America ex rel. *Oscar Southall v. Thaddeus E. Pinkney*, Warden, Pontiac Correctional Center, judgment will enter declaring void the mandatory parole term imposed on Oscar Southall in No. 75-228 in the Circuit Court of Cook County, Illinois, and respondent is ordered to release Oscar Southall forthwith from any detainer or detention occasioned by the mandatory parole term imposed in No. 75-228.

In 77 C 1937, United States of America ex rel. *Emanuel Williams v. State of Illinois*, judgment will enter declaring void the mandatory parole terms imposed on Emanual Williams in No. 74-2032 in the Circuit Court of Cook County, Illinois and the mandatory parole term imposed on Emanuel Williams in No. 74-951 in the Circuit Court of Cook County, Illinois.

ENTER:

/s/ Prentice H. Marshall
United States District Judge

DATED: February 5, 1980

(Title omitted in printing)

MOTION TO ALTER OR AMEND THE JUDGMENTS ENTERED IN THE ABOVE-ENTITLED CASES

Now come the respondents, by their attorney, William J. Scott, Attorney General of the State of Illinois, and, pursuant to Rule 59(e), Federal Rules of Civil Procedure, respectfully move this Court to alter or amend the judgments entered on February 8, 1980, in the above-entitled cases, so as to reflect that said rulings incorporate the prior rulings on the merits of each Petition entered on January 4, 1978. *See United States ex rel. Williams v. Morris,* 447 F. Supp. 95 (N.D. Ill. 1978).

An affidavit of counsel in support of this Motion is attached hereto.

Respectfully submitted

WILLIAM J. SCOTT
Attorney General
State of Illinois

By: /s/ Michael B. Weinstein
Assistant Attorney General
188 W. Randolph St., Suite 2200
Chicago, Illinois 60601
(312) 793-2570

STATE OF ILLINOIS )
) ss.
COUNTY OF COOK )

AFFIDAVIT

Michael B. Weinstein, being first duly sworn on oath, deposes and states as follows:

1. That your affiant is an Assistant Attorney General

assigned to the Criminal Justice Division of the Office of the Attorney General of Illinois.

2. That your affiant is the counsel for the respondents in the above-entitled cases.

3. That on February 1, 1980, in entering an oral judgment in favor of the petitioners, this Honorable Court inquired as to the custodial status of petitioner Oscar Southall (Docket No. 77 C 2184).

4. That your affiant has contacted the Illinois Prison Review Board and has been informed that petitioner Southall, as well as petitioners L. Williams and E. Williams, are no longer in the custody of the Illinois Department of Corrections.

5. That in view of the foregoing facts, said petitioners would apparently not be able to avail themselves of the remedy provided by the Illinois Post-Conviction Hearing Act. *See Ill. Rev. Stat.*, 1979, ch. 38, §122-1. ("Any person *imprisoned in the penitentiary* . . . may institute a proceeding under this Article.")

6. That respondents, therefore, do not intend to further litigate the issue pertaining to exhaustion of available state court remedies.

7. That respondents, however, do intend to appeal the factual conclusions which this Court used as a basis for granting the respective Writs of Habeas Corpus.

WHEREFORE, your affiant moves this Court to alter or amend its judgments in the above-entitled cases, awarding the respective Writs of Habeas Corpus, so as to incorporate its prior rulings on the merits of each petitioner's claim (which prior rulings were entered on January 4, 1978). *See United States ex rel. Williams v. Morris*, 447 U.S. 95 (N.D. Ill. 1978).

/s/ Michael B. Weinstein

SUBSCRIBED and SWORN to
before me this 19th day
of February, 1980.

/s/ Gail D. Houdek
NOTARY PUBLIC

(Notice and affidavit of service omitted in printing)

(Title omitted in printing)

Honorable Prentice H. Marshall

February 26, 1980

* * *

Enter order granting respondents motion to alter or amend the judgments entered in the above cases.

(Title omitted in printing)

JOINT NOTICE OF APPEAL

Notice is hereby given that ERNEST MORRIS, THADDEUS E. PINKNEY and the PEOPLE OF THE STATE OF ILLINOIS, respondents above named, hereby appeal to the United States Court of Appeals for the Seventh Circuit from the final judgments entered in these consolidated actions on the 5th day of February, 1980, as well as the subsequent orders entered in these consolidated actions on the 26th day of February, 1980.

Respectfully submitted,

WILLIAM J. SCOTT
Attorney General
State of Illinois

By: /s/ Michael B. Weinstein
Assistant Attorney General
188 W. Randolph Street
(Suite 2200)
Chicago, Illinois 60601
(312) 793-2570

Attorney for respondents.

(Notice and affidavit of service omitted in printing)

Opinion by Judge Cummings

JUDGMENT — ORAL ARGUMENT

# United States Court of Appeals

For the Seventh Circuit

Chicago, Illinois 60604

October 22, 1980

Before

Hon. WALTER J. CUMMINGS, Circuit Judge
Hon. ROBERT A. SPRECHER, Circuit Judge
Hon. WILLIAM J. BAUER, Circuit Judge

| | |
|---|---|
| UNITED STATES OF AMERICA ex rel. LAWRENCE WILLIAMS, OSCAR SOUTHALL and EMANUEL WILLIAMS,<br>Petitioners-Appellees,<br>No. 80-1296<br><br>vs.<br><br>ERNEST MORRIS, Warden, Stateville Correctional Center; THADDEUS E. PINKNEY, Warden, Pontiac Correctional Center; and PEOPLE OF THE STATE OF ILLINOIS,<br>Respondents-Appellants. | Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.<br><br>Nos. 77-C-2402, 77-C-2184 and 77-C-1937<br>Prentice H. Marshall, Judge |

This cause was heard on the record from the United States District Court for the Northern District of Illinois, Eastern Division, and was argued by counsel.

On consideration whereof, IT IS ORDERED AND ADJUDGED by this Court that the judgment of the said District Court in this cause appealed from be, and the same is hereby, AFFIRMED IN PART AND REVERSED IN PART, in accordance with the opinion of this court filed this date.

(Certification omitted in printing)

# In the
# United States Court of Appeals
## For the Seventh Circuit

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No. 80-1296

UNITED STATES OF AMERICA ex rel. LAWRENCE WILLIAMS, OSCAR SOUTHALL and EMANUEL WILLIAMS,

*Petitioners-Appellees,*

*v.*

ERNEST MORRIS, Warden, Stateville Correctional Center; THADDEUS E. PINKNEY, Warden, Pontiac Correctional Center; and PEOPLE OF THE STATE OF ILLINOIS,

*Respondents-Appellants.*

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Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.
Nos. 77 C 2402, 77 C 2184 and 77 C 1937—Prentice H. Marshall, *Judge.*

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ARGUED SEPTEMBER 16, 1980—DECIDED OCTOBER 22, 1980

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Before CUMMINGS, SPRECHER and BAUER, *Circuit Judges.*

CUMMINGS, *Circuit Judge*. Petitioners, who pleaded guilty in their state court criminal prosecutions, sought writs of

habeas corpus claiming that state judges violated petitioners' Fourteenth Amendment rights by failing to inform them that a mandatory three-year parole term would automatically attach to the sentences they were promised under plea agreements. The petitions were consolidated below, and District Judge Prentice Marshall, finding *United States* ex rel. *Baker v. Finkbeiner*, 551 F.2d 180 (7th Cir. 1977), controlling, held that petitioners were entitled to relief. 447 F. Supp. 95 (N.D. Ill. 1978) (*Williams I*).

On appeal, this Court reversed, holding that petitioners had failed to exhaust an available state court remedy. 594 F2d. 614 (7th Cir. 1979).[1] Petitioners thereafter renewed their requests for expungement of their mandatory parole terms, contending that a subsequent Illinois Supreme Court decision showed conclusively that no state court remedy was available. Judge Marshall agreed and for the reasons set forth in *Williams I* granted the relief sought. 483 F. Supp. 776 (N.D. Ill. 1980) (*Williams II*). The State appeals on the merits.[2] We affirm in part and reverse in part.

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[1] We also held that the petitions were not moot by reason of the fact that two of the petitioners had completed their entire sentence periods including the added parole term and the other had been discharged in compliance with the order of the district court because there remained collateral consequences which might have lingering effects since all three petitioners were found guilty of parole violations. 594 F.2d at 615. See *Carafas v. LaVelle*, 391 U.S. 234, 238-240; *Sibron v. New York*, 292 U.S. 40, 50-58.

[2] The State does not agree with Judge Marshall's conclusion on the exhaustion question but does not raise it on appeal because "none of the petitioners are presently in the custody of the Illinois Department of Corrections *** [and] are, therefore, precluded, by Illinois law, from filing a postconviction petition" (Br. 12).

I

*Lawrence Williams*

Petitioner Lawrence Williams pleaded guilty in the Circuit Court of Cook County on March 11, 1975, to a single charge of burglary, which at the time carried a penalty of one to twenty years imprisonment plus a mandatory three-year parole term. Ill. Rev. Stat. Ch. 38, §§119-1, [*sic*] 1105-8-1(b)(3), 1005-8-1(c)(3), 1005-8-1(e)(2). Under the terms of a plea agreement reached by Williams' public defender and the prosecutor, Williams was to receive an indeterminate sentence of one to two years in prison.

Before accepting the guilty plea, the trial judge admonished Williams of its consequences, elicited Williams' understanding and acceptance of the terms of the plea agreement, and indicated that the court would accept the recommended sentence. The judge then received Williams' acknowledgement that he understood the nature of the charges and his constitutional rights. A factual basis for the plea was established, and Williams indicated that he understood that by pleading guilty he admitted those facts. After advising Williams of the statutory penalty of one to 20 years imprisonment and hearing evidence in aggravation and mitigation of the offense, the trial judge sentenced Williams to not less than one nor more than two years in prison. The transcript contains no statement by the court, the prosecutor or the public defender that the recommended and actual sentence included a mandatory three-year parole term. Nor does the mandatory parole term appear on the sentencing order.

Williams completed his sentence on May 20, 1976, and was at that time released on parole. Williams claimed to have been unaware of the mandatory parole term until two months prior to his discharge. While serving the parole term, Williams was arrested on March 16, 1977, charged as a parole

violator. He was reincarcerated at Stateville Correctional Center in Joliet, Illinois, on this charge when the Writ of Habeas Corpus was issued in *Williams I*. Before the denial of the State's Motion to Reconsider in *Williams I* took effect, Williams was released on a six months "mandatory supervisory release term" on February 1, 1978, pursuant to Ill. Rev. Stat. Ch. 38 § 1005-8-1. This revised law also had the effect of reducing Williams' parole term from three to two years. The period of mandatory release expired on August 1, 1978, at which time Williams was released from the custody of the Illinois Department of Corrections. He had been in the custody of the state for three years and four and one-half months, including 28 months in prison.

*Oscar Southall*

Petitioner Oscar Southall pleaded guilty in the Circuit Court of Cook County on March 19, 1975, to a single charge of burglary carrying the same penalty of one to 20 years followed by three years of mandatory parole. Pursuant to the plea agreement reached by his public defender and the prosecutor and ratified by the court, Southall was to receive an indeterminate sentence of one to two years in prison. The proceeding at which the trial judge accepted Southall's plea and sentenced him to one to two years in prison does not differ significantly from the above-described proceeding involving Lawrence Williams. Again, the transcript contains no statement by the prosecutor, the public defender or the trial judge that the recommended and actual sentences included a mandatory three year parole term. Again, the sentencing order contains no reference to a mandatory parole term.

Southall completed his sentence and was released on parole on September 22, 1975. He was declared a parole violator on October 8, 1976, and reincarcerated. He was subsequently reparoled and eventually discharged from the custody of the

Illinois Department of Corrections on October 24, 1979. Southall had been in the custody of the state for approximately four years and seven months, including 23 months in prison.

*Emanuel Williams*

Petitioner Emanuel Williams' case involves two guilty pleas. The first was entered on July 31, 1974, in the Circuit Court of Cook County to a charge of burglary carrying a penalty of one to 20 years imprisonment plus three years mandatory parole. Williams was sentenced in accordance with the prosecution's recommendation to one to three years in prison.[3] There is no indication in the transcript of the proceedings at which the plea was entered and Williams was sentenced that he was informed by his attorney, the prosecutor or the court that he would be subject to a mandatory parole term. There is no reference to a mandatory parole term in the sentencing order.

Two days later, on August 2, 1974, Williams entered a guilty plea in the same court to a charge of theft which, because it involved more than $150, carried a penalty of one to ten years imprisonment and a mandatory three-year parole term. The guilty plea was entered pursuant to an agreement between Williams' attorney and the prosecutor calling for a

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[3] It is not clear from the transcript whether the recommended and actual sentences were made pursuant to a plea agreement or not. Judge Marshall initially found that the adequacy of the first guilty plea was not ripe for summary judgment. 447 F.Supp. at 105. Subsequently, he must have determined that the plea was made pursuant to a plea bargain because his order granted the relief sought with respect to this plea (State's Br. at A 7). In any event, the State does not challenge the order with respect to this plea on the basis of the factual record.

recommended sentence of one to three years in prison. The trial judge, who was not the same judge as in the July 31 proceeding, accepted the prosecution's recommendation in sentencing Williams, but did not participate in or ratify the plea agreement prior to accepting Williams' plea. The judge also warned Williams that a mandatory parole term was included in the maximum sentence for the charge to which Williams sought to plead guilty. He was not told that a mandatory parole term attached to the prison term negotiated by his attorney and the prosecution.

As a result of the two guilty pleas, Williams was imprisoned to serve concurrent sentences of one to three years. He was released on parole on August 23, 1976, but was returned to prison on December 10, 1976, for a parole violation. Williams was released again (on a $5,000 recognizance bond) following the decision in *Williams I*. His sentence, including the statutory parole term, expired on September 17, 1978. Williams had been in custody of the state for approximately four years and four and one-half months, including 27 months in prison.

II

In *United States* ex. rel. *Baker v. Finkbeiner, supra*, this Court held that the failure to inform a state criminal defendant of a mandatory parole term accompanying his negotiated prison sentence violated the Due Process Clause of the Fourteenth Amendment. Baker had pleaded guilty to two criminal charges pursuant to a plea agreement ratified by the trial court under which he was told he would receive a sentence of one to two years in prison. He was never informed by his attorney, the prosecutor or the court that in actuality his sentence would include a mandatory two-year parole term. After his release from prison, Baker was arrested as a parole violator and reincarcerated. The district court denied his

petition for collateral relief. This Court reversed, holding that the mandatory parole term constituted a substantial addition to the one to two years imprisonment Baker was promised and that therefore he had been deprived of the benefit of his plea bargain in violation of the Due Process Clause. We ordered the parole term expunged and Baker released from custody, reasoning that since Baker had performed his part of the bargain, the state should be held to its promise.

Before turning to the applicability of *Baker* to the petitioners here, we address the State's threshold argument that *Baker* must be overruled in light of *United States v. Timmreck*, ____ U.S. ____, 47 L.W. 4577. *Timmreck* involved a federal defendant who pleaded guilty on advice of counsel to a charge carrying a maximum penalty of 15 years in prison and a $25,000 fine plus a mandatory parole term of at least three years. In the Rule 11 (Fed. R. Crim. Pro.) proceeding, the district court judge properly advised defendant of the maximum prison term and fine but failed to inform him of the mandatory parole term. The judge accepted Timmreck's guilty plea and in a later proceeding sentenced him to ten years in prison plus a parole term of five years and a fine of $5,000. Timmreck neither objected to the sentence at the time it was pronounced nor appealed his conviction, but later moved to vacate the sentence on the ground that the trial judge had violated Rule 11 by accepting the plea without admonishing him of the mandatory parole term. The Supreme Court, reversing the Sixth Circuit, held that a technical violation of Rule 11 resulting in no prejudice to the defendant and which could have been raised on direct appeal will not support collateral relief. In so doing, the Court expressly declined to decide whether collateral relief "would be available if a violation of Rule 11 occurred in the context of other aggravating circumstances." 47 L.W. at 4579. Cf. *Hill v. United States*, 368 U.S. 424.

We think it plain from the foregoing summaries that the holding in *Baker* is in no way inconsistent with that of *Timmreck*. Unlike *Timmreck*, *Baker* involved not merely a technical violation of proper procedure but a complete failure to inform the defendant at any time that he would in fact be in the custody of the state for a period of three to four years (including parole) rather than the one to two years he had been promised. Moreover, unlike Timmreck, whose combined prison and parole terms were within the maximum penalty he had been warned he could receive and who had never been promised less than the maximum, Baker was prejudiced in that he received a sentence calling for two years of custody (on parole) more than he had bargained for. In short, the two cases are not only not "on all fours" as the State acknowledges, but wholly different. We therefore find no cause to reexamine the decision in *Baker*.

III

The State's first alternative argument is that even if *Baker* is still good law, it is not applicable on its facts to the guilty plea of petitioner Southall or the second guilty plea of petitioner Emanuel Williams.[4] With respect to Southall, the State contends that since he had bargained for as much as three years in prison and actually served only 23 months, his case falls outside *Baker* and within *Bachner v. United States*, 517 F.2d 589 (7th Cir. 1975).

In *Bachner*, we held that the failure to inform a defendant of a mandatory parole term was not an error of constitutional magnitude where the sentence imposed did not exceed the

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[4] The State concedes that Lawrence Williams' case is factually indistinguishable from *Baker* (Br. at 22). As noted, *supra* note 3, the State does not challenge the factual applicability of *Baker* to Emanuel Williams' guilty plea of July 31, 1974.

maximum sentence the defendant was informed he would receive. What distinguishes *Bachner* from *Baker* is, first, that there was no plea agreement so that the defendant had no basis for expecting anything less than the maximum statutory sentence when he pleaded guilty and, second, that the sentence imposed including the mandatory parole term was within the maximum penalty defendant had been warned he could receive. Therefore, the defendant in *Bachner* was not prejudiced or deprived of the benefit of his plea bargain by the judge's failure to advise him of the mandatory parole term.

Southall's case is like *Baker*, not *Bachner*, in that Southall received a total sentence, including the three-year parole term, that exceeded the sentence he had bargained for and was promised. The State in effect asks us to ignore the additional parole term because Southall was actually incarcerated for less than the maximum three years of his negotiated plea. But, as we stated in *Baker*, "the conditions of parole place a number of onerous burdens on the liberty of paroled individuals," including the possibility of being returned to prison for technical parole violations. 551 F.2d at 184. While it is true that the defendant in *Baker* ended up spending 32 months in prison on a promised maximum sentence of two years imprisonment, it was the parole term itself with its concomitant burdens that we found to be a substantial addition to the negotiated sentence and not the additional time in prison resulting from the parole violation. In other words, a defendant does not have to violate his mandatory parole term and be reincarcerated for a total period in excess of the maximum negotiated sentence before he can object under *Baker* that the sentence imposed differed substantially from that which he was promised as an inducement to plead guilty. See *United States* ex rel. *Ferris v. Finkbeiner*, 551 F.2d 187 (7th Cir. 1977).

With respect to Emanuel Williams' guilty plea of August 2, 1974, the State argues that *Bachner* is controlling because the trial court was not a party to any plea agreement. We agree. Although the trial judge at the time of sentencing accepted the prosecution's recommendation for a sentence of one to three years imprisonment "as per agreement" (Pets. Br., App. B, at 8), the agreement referred to was one between Williams' attorney and the prosecutor only. Because the trial judge neither participated in nor ratified the agreement prior to accepting Williams' plea, it was not binding on the court. Moreover, the judge explicitly so warned the defendant:

> THE COURT: Mr. Orange, also known as Mr. Williams, although an agreement as to the penalty has been reached between your attorney and the State's Attorney, the Court is not bound to accept those terms; I could impose a lesser or a greater penalty in this case. Do you understand this?
>
> DEFENDANT: Yes, sir.
>
> THE COURT: Knowing that, do you still wish to plead guilty?
>
> DEFENDANT: Yes. (Pets. Br., App. B, at 7-8).

Thus like the defendant in *Bachner* and unlike the defendant in *Baker,* Emanuel Williams had no basis for expecting anything less than the statutory maximum. He was warned of this maximum, including the mandatory parole term. Judge Marshall found this warning insufficient for the purposes of informing Williams that a mandatory parole term would be part of the plea he had negotiated with the prosecutor because it was made in the context of the maximum sentence Williams could get under the law. Whether this finding was correct or, as the State contends, erroneous, we need not decide because there was no plea agreement binding on the court. Because the sentence imposed including the mandatory parole term was far less than the maximum period of

imprisonment Williams was warned he could receive, he would not have been prejudiced even if the judge had failed to mention the parole term altogether. Indeed, that would be the *Bachner* case. Accordingly, we reverse the order with respect to Emanuel Williams' guilty plea of August 2, 1974.

IV

With respect to petitioners Southall and Lawrence Williams, the State's alternative position is that *Baker* established a new and unexpected rule of law entitled only to prospective application and was therefore erroneously applied here to guilty pleas entered prior to March 17, 1977, the date *Baker* was decided. The State raised this issue for the first time on a Motion to Reconsider in *Williams I*. Judge Marshall rejected the argument on the grounds that *Baker* did not create a new and unexpected rule of law and that even if it had it would be entitled to retroactive application under the balancing test set forth in *Stoval v. Denno*, 388 U.S. 293. See 447 F. Supp. at 105-108. We agree with both the reasoning and conclusion of Judge Marshall's thorough opinion on this issue and therefore adopt it as our own.

The judgment is reversed with respect to the August 2, 1974, guilty plea of petitioner Emanuel Williams and in all other respects affirmed.

A True Copy:
Teste:

/s/ Shailot Vack, Deputy
Clerk of the United States
Court of Appeals for the
Seventh Circuit

# OSCAR SOUTHALL

**OSCAR SOUTHALL**

June 16, 1977 — Received petition for writ of habeas corpus.

June 16, 1977 — Filed civil cover sheet.

June 16, 1977 — Filed petition to file and proceed in forma pauperis.

June 21, 1977 — Enter order dated June 20, 1977: Enter order granting leave to proceed in forma pauperis. Respondent ordered to answer or otherwise plead within 20 days after receiving the petition. MARSHALL, J.

June 21, 1977 — Filed petition for writ of habeas corpus and one copy.

July 5, 1977 — Enter order dated July 1, 1977: Respondent is ordered to answer or otherwise plead on or before July 21, 1977. MARSHALL, J.

July 21, 1977 — Filed respondent's motion to dismiss; notice.

August 10, 1977 — Enter order dated August 9, 1977: Defendant's motion to dismiss taken under advisement. Plaintiff to respond by September 8, 1977. Defendant to reply by September 23, 1977. Court to rule by mail. MARSHALL, J.

August 18, 1977 — Filed petitioner's reply to states [*sic*] motion to dismiss with exhibit attached.

September 16, 1977 — Filed respondent's Motion to supplement Exhibits, Notice, Exhibits.

January 5, 1978 — Enter order dated January 4, 1978: For the reasons stated in the attached Memorandum Opinion, respondent's motion to dismiss is denied and judgment will enter declaring void the mandatory parole term imposed on Oscar Southall in No. 75-228 in the Circuit Court of Cook County, Illinois and respondent is ordered to release

Oscar Southall forthwith. (DRAFT. See attached Memorandum Opinion).

January 5, 1978 — Enter Rule 58 Judgment by the Clerk dated January 4, 1978.

January 10, 1978 — Filed defendant's [sic] notice; motion for stay.

January 11, 1978 — Enter order dated January 10, 1978: Respondent's motion for a stay of the order of Judge Marshall dated January 4, 1978, ordering the release of the petitioner is granted to and until January 16, 1978. Respondent's motion to reconsider shall be filed by January 13, 1978. Cause set for hearing on respondent's motion for stay before Judge Marshall on January 16, 1978 at 9:30 a.m. FLAUM, J.

January 13, 1978 — Filed respondent's motion to reconsider; Notice; attachments.

January 17, 1978 — Enter order dated January 16, 1978: Order of January 4, 1978 is stayed until further order of court. Cause set for ruling on January 25, 1978 at 9:30 a.m. MARSHALL, J.

January 31, 1978 — Enter order dated January 27, 1978: Enter order appointing Martha Jenkins to represent plaintiff under Criminal Justice Act. Cause set for status hearing on February 6, 1978 at 9:30 a.m. MARSHALL, J.

February 1, 1978 — Enter order dated January 27, 1978: For the reasons stated in the attached Memorandum Opinion, we hold that *United States ex rel. Baker v. Finkbeiner* is to be given full retroactive effect. Respondent's motion to reconsider is denied. (DRAFT. See attached Memorandum Decision). MARSHALL, J.

February 24, 1978 — Filed defendant's [sic] notice of appeal.

June 1, 1978 — Filed copy of transcript from Circuit Court No. 75-228 labeled Exhibit A.

June 1, 1978 — Filed stipulation re: supplement to record on appeal.

June 12, 1978 — Certified and transmitted to USCA 7th Circuit the supplement to the record on appeal consisting of Exhibit A filed June 1, 1978 and the stipulation to supplement the record on appeal filed June 1, 1978.

May 1, 1979 — Filed April 30, 1979 Opinion Nos. 78-1321, 78-1322, 78 C [sic] 1323, 78-1380.

May 1, 1979 — Filed April 30, 1979 Certified copy of order from the U.S.C.A., 7th Circuit dated March 13, 1979: . . . It is ordered and adjudged by this court that the judgment of the said District Court in these causes appealed from be and the same are hereby, REVERSED and REMANDED with directions. . . (to dismiss the petition but with [*sic*] prejudice. . . .)

May 17, 1979 — Enter order dated May 17, 1979: Status hearing held. Case assigned to Judge Marshall's past calendar until further order of court. MARSHALL, J.

October 18, 1979 — Filed October 12, 1979 Petitioner's Notice of Motion; Motion for Ruling expunging terms of mandatory parole for petitioners.

October 18, 1979 — Enter order dated October 12, 1979: Respondent to answer petitioner's motion for expunging terms of mandatory parole by October 26, 1979. Reply to answer to be filed by November 2, 1979. Ruling to be made by mail. MARSHALL, J.

October 26, 1979 — Filed October 26, 1979 Response to Petitioner's Motion for Ruling Expunging Terms of Mandatory Parole for Petitioners.

November 6, 1979 — Filed November 2, 1979 plaintiff's reply memorandum in support of petitioner's motion to expunge mandatory parole terms.

February 8, 1980 — Enter order dated February 1, 1980: For the reasons stated in the attached memorandum decision, we hold that the denial of leave to appeal in McCullim [sic], when considered with the precedent from the appellate courts, demonstrates anew the futility of [sic] state remedy. Accordingly judgment will enter expunging petitioners mandatory parole terms. DRAFT. MARSHALL, J.

February 8, 1980 — Enter order February 5, 1980: Judgment will enter declaring void the mandatory parole term imposed on Oscar Southall in No. 75-228 in the Circuit Court of Cook County, Illinois, and respondent is ordered to release Oscar Southall forthwith from any detainer or detention occasioned by the mandatory parole term imposed in No. 75-228. DRAFT. MARSHALL, J.

February 27, 1980 — Enter order dated February 26, 1980: Enter order granting respondent's motion to alter or amend the judgments entered in the above cases. MARSHALL, J.

February 27, 1980 — Filed February 26, 1980 respondent's motion to alter or amend the judgments entered in the above-entitled cases; affidavit; notice.

March 4, 1980 — Filed March 4, 1980 Joint Notice of Appeal by respondent appealing order of February 5, 1980.

March 5, 1980 — Transmitted March 5, 1980 to U.S.C.A., 7th Circuit Information Sheet, copy of docket entries and copy of Notice of Appeal.

**PETITION FOR WRIT OF HABEAS CORPUS**
**UNITED STATES DISTRICT COURT**
**NORTHERN DISTRICT OF ILLINOIS**

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**PERSONS IN STATE CUSTODY**

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United States of America ex rel
Oscar Southall #63512
Petitioner

-vs- Case Number 77 C 2184

Thaddeus E. Pinkney (Warden at
Pontiac Correction [*sic*] Center,
Pontiac Illinois).
Respondent

---

Instructions — Read Carefully

In order for this petition to receive consideration by the District Court, it shall be in writing (legibly handwritten or typewritten), signed by the petitioner and verified (notarized), and it shall set forth in concise form the answers to each applicable question. If necessary petitioner may finish his answer to a particular question on the reverse side of the page or on an additional blank page. Petitioner shall make it clear which question any such continued answer refers to.

Since every petition for habeas corpus must be sworn to under oath, any false statement of a material fact therein may serve as the basis of prosecution and conviction for perjury. Petitioners should, therefore, excercise care to assure that all answers are true and correct.

If the petition is taken in *forma pauperis*, it shall include a petition for leave to file and to proceed in forma pauperis, and an Affidavit of financial status. When all of the forms are completed, the original and one copy shall be mailed to the Clerk of the District Court for the Northern District of Illinois.

1. Place of detention: Pontiac Correction [*sic*] Center. Pontiac, IL 61764
2. Name and location of court which imposed sentence: Criminal Court of Cook County, Illinois. 2600 So. California Ave. Chicago, IL 60608
3. The indictment number or numbers (if known) upon which, and the offense or offenses for which, sentence was imposed:
   (a) Indictment Number 75-228
   (b) _____
   (c) _____
4. The date upon which sentence was imposed and the terms of the sentence:
   (a) Sentence date: 3-19-75. Term of Sentence: One to three years.
   (b) _____
   (c) _____
5. Check whether finding of guilty was made
   (a) after plea of guilty (yes)
   (b) after a plea of not guilty_____
   (c) after a plea of *nolo contendere*_____

6. If you were found guilty after a plea of not guilty, check whether that finding was made by:

   (a) a jury_____

   (b) a judge without a jury_____

7. Did you appeal from the judgment of con iction or the imposition of sentence? _____

8. If you answered "yes" to (7), list

   a) the name of each court to which you appealed:

      i. _____

      ii. _____

      iii. _____

   b) the result in each court to which you appealed:

      i. _____

      ii. _____

      iii. _____

   c) the date of each result:

      i. _____

      ii. _____

      iii. _____

   d) if known, citations of any written opinion or orders entered pursuant to such results:

      i. _____

      ii. _____

      iii. _____

9. If you answered "no" to (7), state your reasons for not so appealing:

   (a) I pleaded guilty with the stipulation that I would be obligated to serve three (3) years. The three (3) years have expired and I am now being detained on violation of a mandatory parole which was not a condition of my sentence. Thus my petition for a Writ of Habeas Corpus.
   I did not file previously because I was not previously aware that I would be detained on violation of mandatory parole.

   (b)

   (c)

10. State concisely the grounds on which you base your allegation that you are being held in custody unlawfully:

   (a) I was sentenced to a term of one to three years on Indictment Number 75-228. The sentence has expired and I am now being held on violation of a mandatory parole which was not a condition of my sentence as I was not admonished of such condition by the sentencing Court. The records will show that my sentence began October 8, 1974 (the date of my arrest), and with the good time earned for good behavior, my discharge date is pass [*sic*] due. Wherefore I pray this Honorable Court will issue its Writ of Habeas Corpus and order petitioner's immediate release.

   (b)

   (c)

11. State concisely and in the same order the facts which support each of the grounds set out in (10):

    (a) The transcript of sentencing procedure relative to Indictment Number 75-228, will support the facts stated above, relative to my one to three year sentence.

    The Institution record office will verify that I have served the maximum on the three years imposed by the sentencing Court.

    (b)

    (c)

12. Prior to this petition have you filed with respect to this conviction: No

    (a) any petition in a state court under the Illinois Post-Conviction Hearing Act, Ill. Rev. Stat. ch. 38, sec. 122? No

    (b) any petition in a state court by way of statutory *coram nobis*. Ill. Rev. Stat. ch. 110, sec. 72? No

    (c) any petitions in state or federal courts for habeas corpus? No

    (d) any petitions in the United States Supreme Court for certiorari other than petitions, if any, already specified in (8)? No

    (e) any other petitions, motions or applications in this or any other court? No

13. If you answered "yes" to any part of (12), list with respect to each petition, motion or application:

    (a) the specific nature thereof:

        i. _____

        ii. _____

iii. _____

iv. _____

(b) the name and location of the court in which each was filed:

i. _____

ii. _____

iii. _____

iv. _____

(c) the disposition thereof:

i. _____

ii. _____

iii. _____

iv. _____

(d) the date of each such disposition:

i. _____

ii. _____

iii. _____

iv. _____

(e) if known, citations of any written opinions or orders entered pursuant to each such disposition:

i. _____

ii. _____

iii. _____

iv. _____

14. Has any ground set forth in (10) been previously presented to this or any other court, state or federal, in any petition, motion or application which you have filed? _____

15. If you answered "yes" to (14), identify:

    (a) which grounds have been previously presented:

        i. _____

        ii. _____

        iii. _____

    (b) the proceedings in which each ground was raised:

        i. _____

        ii. _____

        iii. _____

16. If any ground set forth in (10) has not previously been presented to any court, state or federal, set forth the ground and state concisely the reasons why such ground has not previously been presented:

    (a)

    (b)

    (c)

17. Were you represented by an attorney at any time during the course of

    (a) your arraignment and plea? Public Defender

    (b) your trial, if any? _____

    (c) your sentencing? Public Defender

    (d) your appeal, if any, from the judgment of conviction or the imposition of sentence? _____

(e) preparation, presentation or consideration of any petitions, motions or applications with respect to this conviction which you filed? _____

18. If you answered "yes" to one or more parts of (17), list

(a) the name and address of each attorney who represented:

i. _____

ii. _____

iii. _____

(b) the proceedings at which each such attorney represented you:

i. _____

ii. _____

iii. _____

19. If you are seeking leave to proceed in *forma pauperis*, have your completed the sworn affidavit setting forth the required information (see instructions, page 1 of this form)? Yes

/s/ Oscar Southall

Signature of Petitioner

)
) ss
)

/s/ Oscar Southall, being first sworn under oath, presents that he has subscribed to the above and does state that the information therein is true and correct to the best of his knowledge and belief.

Oscar Southall

Signature of Affiant

SUBSCRIBED AND SWORN to
before me this 14th day
of June, 1977.

/s/ Donald J. [Illegible]
Notary Public

My commission expires

3-15-78

UNITED STATES DISTRICT COURT,
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

Honorable Prentice H. Marshall

January 4, 1978

UNITED STATES OF AMERICA ex rel. OSCAR SOUTHALL v. THADDEUS E. PINKNEY, Warden, Pontiac Correctional Center

ORDER

* * *

For the reasons stated in the attached Memorandum Opinion, respondent's motion to dismiss is denied and judgment will enter declaring void the mandatory parole term imposed on Oscar Southall in No. 75-228 in the Circuit Court of Cook County, Illinois and respondent is ordered to release Oscar Southall forthwith.

(DRAFT. See attached Memorandum Opinion.)

UNITED STATES DISTRICT COURT
for the
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

Civil Action File No. 77 C 2184

U.S.A. ex rel Oscar Southall

*vs.*

Thaddeus E. Pinkney

JUDGMENT

This action came on for (hearing) before the Court, Honorable Prentice H. Marshall, United States District

Judge, presiding, and the issues having been duly (heard) and a decision having been duly rendered.

It is Ordered and Adjudged respondent's motion to dismiss is denied and judgment will enter declaring void the mandatory parole term imposed on Oscar Southall in No. 75-228 in the Circuit Court of Cook County, Illinois and respondent is ordered to release Oscar Southall forthwith.

Dated at Chicago, Illinois, this 4th day of January, 1978.

H. STUART CUNNINGHAM
Clerk of Court

By: /s/ Rita L. Dumas
Deputy Clerk

(Title omitted in printing)

NOTICE OF APPEAL

Notice is hereby given that respondents hereby appeal to the United States Court of Appeals for the Seventh Circuit from an order of January 4, 1978 entered herein granting a writ of *habeas corpus* and from the final order of January 27, 1978 entered herein denying respondent's motion to reconsider.

Respectfully submitted,

WILLIAM J. SCOTT
Attorney General
State of Illinois

BY: /s/ Patrick J. Calihan
Assistant Attorney General
188 W. Randolph St.,
Suite 2200
Chicago, Illinois 60601
(312) 793-2570

(Notice and affidavit of service omitted in printing)

EXHIBIT A

STATE OF ILLINOIS)
) ss.
COUNTY OF COOK )

IN THE CIRCUIT COURT OF COOK COUNTY
COUNTY DEPARTMENT – CRIMINAL DIVISION

| | | |
|---|---|---|
| THE PEOPLE OF THE STATE OF ILLINOIS | ) | |
| vs. | ) | Indictment No. 75-228 |
| | ) | Charge: Burglary |
| OSCAR SOUTHALL | ) | |

REPORT OF PROCEEDINGS
CHANGE OF PLEA

BE IT REMEMBERED that on the 19th day of March, A.D. 1975, this cause came on for trial before the Honorable EARL E. STRAYHORN, Judge of said Court, upon the Indictment herein, and the following proceedings were had:

APPEARANCES:

HON. C. BERNARD CAREY,
State's Attorney of Cook County, by

MR. MARK ZUBOR, and
MR. TERRY EKL,
Assistant State's Attorneys,
appeared for the People;

MR. JAMES J. DOHERTY,
Public Defender of Cook County, by
MR. WILLIAM O'NEAL,
Assistant Public Defender,
appeared for the Defendant.

[2] THE CLERK: People of the State of Illinois versus Oscar Southall.

MR. O'NEAL: Judge, that is the one I was talking to the State with.

THE COURT: All right, pass it.

(After an interval of time, the following proceedings were had:)

THE CLERK: People of the State of Illinois versus Oscar Southall.

MR. O'NEAL: Judge, this is Oscar Southall. This is Indictment No. 75-228. On 2-19-75, there was a conference with the State and the Court and your Honor indicated he would give Mr. Southall one to three years.

We had a problem in that Southall also is on probation before Judge Strzalka and it is my understanding that Judge Strzalka will terminate probation or if he violates him, give him one to three to run concurrent with this sentence.

So based on those allegations, Mr. Southall will withdraw his plea of not guilty and enter a plea of guilty.

THE COURT: Mr. Southall, you have heard your attorney Mr. O'Neal indicate that you wish to plead [3] guilty to this offense.

You are charged in this indictment with the offense of burglary. You understand that on a charge of burglary, you

run the possibility of having me impose a sentence upon you of a minimum of one year and a maximum not to exceed 20 years in the Illinois Department of Corrections and impose a fine upon you from $1 to $10,000; do you understand that that is a possibility?

THE DEFENDANT: Yes.

THE COURT: Those are the limits of the sentence that I can impose upon you even on a plea of guilty, do you understand that?

THE DEFENDANT: Yes, sir.

THE COURT: Do you understand further that by pleading guilty, you are in effect withdrawing your persistence in your demand for trial. You have a right to stand on your demand for trial. You have a right to persist in your demand to be tried on this case. But by pleading guilty, you are in effect withdrawing that demand which you have made by pleading not guilty to have a trial in this case, do you understand that?

THE DEFENDANT: Yes, sir, I understand.

[4] THE COURT: Do you further understand by pleading guilty, you will lose two very important personal constitutional rights that are personal to you. One, you will lose your right to a trial by jury or if you didn't wish to have a jury, the right to be tried by this Court without a jury; and, second, you will lose your right to demand that the prosecution bring all of the witnesses that will testify against you in this case into open court and have those witnesses confront you in your sight, presence and hearing, and after being sworn, testify and be subjected to cross examination by your counsel.

Each of those are personal individual constitutional rights that you have that are personal to you and by pleading guilty, you will lose each one of those constitutional privileges, do you understand that?

THE DEFENDANT: Yes, sir.

THE COURT: Has anyone used any force on you, abused you, threatened you, put you under any duress, given you any promises of any reward aside from the conference results in order to force you or induce you to plead guilty to this indictment?

THE DEFENDANT: No.

[5] THE COURT: Coming back to the conference results, in the course of the conference, it was disclosed to the Court that you are presently on probation to Judge Chester Strzalka on another matter that was pending before him in which he had placed you on probation for a period of two years in June or thereabouts of 1974. Your counsel was concerned as to what Judge Strzalka's position would be in the event you chose to plead guilty in this indictment or was found guilty in this indictment.

As a result, I spoke to Judge Strzalka by telephone this morning and advised him of the fact that you were in my courtroom and of the charge that you were standing before me on and told him that you were one of his probationers, advised him of what my sentence would be on your plea of guilty as a result of the plea bargaining and asked him what his position would be, and he advised me and authorized me to tell your counsel and the State's Attorney that if you chose to plead guilty to this indictment and if the Court, this Court, sentenced you to a term of a minimum of one year and a maximum not to exceed three years, that if he violated your probation, he would impose the same sentence upon you on a violation [6] of probation and make the sentence run concurrent or he might order the probation revoked and terminated as being unsatisfactory.

He also requested that the State's Attorney of the Court, that he request the State's Attorney to write Judge Strzalka a letter advising him of what this Court is putting on the record with reference to what Judge Strzalka has stated to me so that he will be reminded whenever this matter comes before him of what he stated this morning.

Those are the conference results. That is the sentence which will be imposed by the Court as a result of the conference, and the record should indicate the defendant has been duly warned of the consequences of his plea and after so being warned, persists. And the record should also disclose the Court has set forth in open court on the record the precise terms of the plea bargaining conference, would impose that sentence and the Court has placed on the record by the authority of Judge Strzalka his statement concerning the disposition of his matter that the defendant has before Judge Strzalka on the violation of probation.

Mr. State's Attorney.

[7] MR. ZUBOR: Your Honor, I believe it will be stipulated between the parties, namely, Mr. Oscar Southall present before the court represented by his attorney, Mr. O'Neal; and the People of the State of Illinois, State's Attorney Bernard Carey and his Assistants here in court, that on today's date the age of the defendant Mr. Southall is —

THE DEFENDANT: 27.

MR. ZUBOR: —27 years of age.

THE CLERK: 27?

MR. O'NEAL: 27.

MR. ZUBOR: That venue for this matter properly lies before this court, the event, the incident in the indictment having taken place in the City of Chicago, County of Cook and State of Illinois; so stipulated?

MR. O'NEAL: So stipulated.

MR. ZUBOR: It will be further stipulated by and between the same parties that if various individuals were called to testify, namely Ronnie, R-o-n-n-i-e, Hardy, H-a-r-d-y, Officer Ulleweit, U-l-l-e-w-e-i-t, Star No. 12182 and Officer McInerney — McIntyre, excuse me, M-c-I-n-t-y-r-e, Star No. 3463, their collective testimony would be that on October [8] 8, 1974, at approximately 3:40 P.M., police officers had occasion to be in the vicinity of 2422 East 74th Street in the City of Chicago, County of Cook and State of Illinois. At that time

they were responding to a call of a burglary in progress at that location.

Upon arrival at that location, they arrested Oscar Southall exiting that building carrying with him two rifles. The defendant was placed under arrest, advised of his constitutional rights, and taken to the police station.

The rifles, one BB gun and one other rifle were identified by Ronnie Hardy as being his property and having been his property on that date and that he did not give anyone permission to enter his apartment, to take these items from his apartment which were in there when he left his apartment that day, and specifically he did not give Oscar Southall permission to enter his premises and take those items from his premises.

He identifies those weapons as being weapons that were registered to him and that were in his apartment on that day.

So stipulated?

[9] MR. O'NEAL: So stipulated.

THE COURT: Let the record show there is a sufficient factual basis to accept the plea. The plea will be accepted. There will be a finding of guilty on the plea of guilty finding the defendant Oscar Southall guilty of the offense of burglary in manner and form as charged in the indictment. Judgment will be entered on the finding.

Will there be a waiver of pre-sentence?

MR. O'NEAL: Yes.

THE COURT: Pre-sentence in this case will be waived. A waiver form will be filed.

We will proceed to a hearing in aggravation and mitigation. Mr. State's Attorney what do you have in aggravation?

MR. ZUBOR: Your Honor, the State would have nothing over and above that which was discussed in the conference. For the record, the indictment under which Mr. Southall is presently on probation is Indictment No. or excuse me, Information No. 74-1289 in which he received two years probation from Judge Strzalka on May 24 of 1974.

THE COURT: Mr. O'Neal, mitigation?

MR. O'NEAL: I have nothing in mitigation.

[10] THE COURT: Mr. Southall, do you wish to say anything before I impose sentence?

THE DEFENDANT: No, sir.

THE COURT: It is the sentence of this Court, Oscar Southall, that you be taken from the bar of this court, remanded to the custody of the officials of the Department of Corrections, State of Illinois, for incarceration in a penal institution of this state for a minimum period of one year and a maximum period not to exceed three years.

Mittimus to issue forthwith.

Take him away.

(Which were all the proceedings had on the change of plea in the above-entitled cause.)

(Court reporter's certificate omitted in printing)

UNITED STATES DISTRICT COURT,
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

Honorable Prentice H. Marshall

Feb. 5, 1980

Judgment Order

* * *

Judgment will enter declaring void the mandatory parole term imposed on Oscar Southall in No. 75-228 in the Circuit Court of Cook County, Illinois, and respondent is ordered to release Oscar Southall forthwith from any detainer or detention occasioned by the mandatory parole term imposed in No. 75-228. Draft

IN THE
UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

UNITED STATES OF AMERICA ex rel.
LAWRENCE WILLIAMS,
Petitioner,

v. No. 77 C 2402

ERNEST MORRIS, Warden,
Respondent.

UNITED STATES OF AMERICA ex rel.
OSCAR SOUTHALL,
Petitioner,

v. No. 77 C 2184

THADDEUS E. PINCKNEY, Warden, Pontiac
Correctional Center,
Respondent.

UNITED STATES OF AMERICA ex rel.
EMANUEL WILLIAMS,
Petitioner,

v. No.77 C 1937

PEOPLE OF THE STATE OF ILLINOIS,
Respondents.

JUDGEMENT

In 77 C 2402, United States of America ex rel. Lawrence Williams v. Ernest Morris, Warden, judgment will enter declaring void the mandatory parole term imposed on Lawrence Williams in No. 74-3339 in the Circuit Court of Cook County, Illinois.

In 77 C 2184, United States of America ex rel. Oscar Southall v. Thaddeus E. Pinkney, Warden, Pontiac Correctional Center, judgment will enter declaring void the mandatory parole term imposed on Oscar Southall in No. 75-228 in the Circuit Court of Cook County, Illinois, and respondent is ordered to release Oscar Southall forthwith from any detainer or detention occasioned by the mandatory parole term imposed in No. 75-228.

In 77 C 1957, United States of America ex rel. Emanuel Williams v. State of Illinois, judgment will enter declaring void the mandatory parole terms imposed on Emanuel Williams in No. 74-2032 in the Circuit Court of Cook County, Illinois and the mandatory parole term imposed on Emanuel Williams in No. 74-951 in the Circuit Court of Cook County, Illinois.

ENTER:

/s/ Prentice H. Marshall
United States District Judge

DATED: February 5, 1980

(Title omitted in printing)

JOINT NOTICE OF APPEAL

Notice is hereby given that ERNEST MORRIS, THADDEUS E. PINKNEY and the PEOPLE OF THE STATE OF ILLINOIS, respondents above named, hereby appeal to the United States Court of Appeals for the Seventh Circuit from the final judgments entered in these consolidated actions on the 5th day of February, 1980, as well as the subsequent orders entered in these consolidated actions on the 26th day of February, 1980.

Respectfully submitted,

WILLIAM J. SCOTT
Attorney General
State of Illinois

By /s/ Michael B. Weinstein
Assistant Attorney General
188 W. Randolph Street
(Suite 2200)
Chicago, Illinois 60601
(312) 793-2570

Attorney for respondents.

(Notice and affidavit of service omitted in printing)

Opinion by Judge Cummings

JUDGMENT – ORAL ARGUMENT

# United States Court of Appeals

For the Seventh Circuit
Chicago, Illinois 60604

October 22, 1980

Before
Hon. WALTER J. CUMMINGS, Circuit Judge
Hon. ROBERT A. SPRECHER, Circuit Judge
Hon. WILLIAM J. BAUER, Circuit Judge

| | |
|---|---|
| UNITED STATES OF AMERICA ex rel. LAWRENCE WILLIAMS, OSCAR SOUTHALL and EMANUEL WILLIAMS, Petitioners-Appellees, No. 80-1296 vs. ERNEST MORRIS, Warden, Stateville Correctional Center; THADDEUS E. PINKNEY, Warden, Pontiac Correctional Center; and PEOPLE OF THE STATE OF ILLINOIS, Respondents-Appellants. | Appeal from the United States District Court for the Northern District of Illinois, Eastern Division<br><br>Nos. 77-C-2402, 77-C-2184 and 77-C-1937<br><br>Prentice H. Marshall, Judge |

This cause was heard on the record from the United States District Court for the Northern District of Illinois, Eastern Division, and was argued by counsel.

On consideration whereof, IT IS ORDERED AND ADJUDGED by this Court that the judgment of the said District Court

in this cause appealed from be, and the same is hereby, AFFIRMED IN PART AND REVERSED IN PART, in accordance with the opinion of this court filed this date.

(Certification omitted in printing)

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IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1980

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MICHAEL P. LANE,

Petitioner,

v.

LAWRENCE WILLIAMS and OSCAR SOUTHALL,

Respondents,

---

# RESPONSE TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

---

Martha A. Mills
Sue Anne Herrmann
Cotton, Watt, Jones, King & Bowlus
Suite 4750, One IBM Plaza
Chicago, Illinois 60611
(312) 467-0590
Attorneys for Respondents

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## CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The Fourteenth Amendment to the Constitution of the United States provides, in pertinent part, that:

> No State shall . . . deprive any person of life, liberty, or property, without due process of law; . . . .

Illinois Supreme Court Rule 402(a), Ill. Rev. Stat. ch. 110A, §402(a) (1970).

> Pleas of Guilty. In hearings on pleas of guilty, there must be substantial compliance with the following:
>
> > (a) Admonitions to Defendant. The Court shall not accept a plea of guilty without first, by addressing the defendant personally in open court, informing him of and determining that he understands the following:
> >
> > > (1) the nature of the charge;
> > > (2) the minimum and maximum sentence prescribed by law, including, when applicable, the penalty to which the defendant may be subjected because of prior convictions or consecutive sentences;
> > > (3) that the defendant has the right to plead not guilty, or to persist in that plea if it has already been made, or to plead guilty; and
> > > (4) that if he pleads guilty there will not be a trial of any kind, so that by pleading guilty he waives the right to a trial by jury and the right to be confronted with the witnesses against him.

## SUMMARY OF ARGUMENT

I. The decision of this Court in United States v. Timmreck, 441 U.S. 780 (1979) is inapplicable to the instant case in that Timmreck involved only a technical violation of Rule 11 of the Federal Rules of Criminal Procedure. In contrast, the respondents herein pleaded guilty pursuant to negotiated plea agreements, and were not informed, nor did they know, of the existence of mandatory parole terms. Thus, there is no conflict between the decision of this Court in Timmreck and the decision of the United States Court of Appeals for the Seventh Circuit in the instant case.

II. Neither the District Court nor the Court of Appeals erred in giving retroactive application to the decision in United States ex rel. Baker v. Finkbeiner, 551 F. 2d 180 (7th Cir. 1977). The decision in Baker reaffirmed the long-standing principle that defendants must have a full understanding of the consequences of their pleas. Hence, it involved no new or unexpected rule of procedure. In addition, the integrity of the fact-finding process depends on the same full disclosure of all the consequences of a plea of guilty. Finally, balancing the purpose of the rule against the extent of reliance on the old rule together with the effect on the administration of justice, the scales tip in favor of retroactive application.

## ARGUMENT

### I.

### The Decision of This Court In United States v. Timmreck Is Inapplicable

In his petition for writ of certiorari, the petitioner argues that the decision of the United States Court of Appeals for the Seventh Circuit in the instant case is in direct conflict with the decision of this Court in United States v. Timmreck, 441 U.S. 780 (1979). There are, however, several important differences between United States v. Timmreck, supra, and the instant case which make the decision in Timmreck inapplicable and obviate any alleged conflict between the two decisions.

In Timmreck, the defendant pleaded guilty in the federal district court to a charge of conspiracy to distribute controlled substances. Addressing the defendant as required by the old Rule 11 of the Federal Rules of Criminal Procedure, the district court advised the defendant of the maximum penalty, 15 years imprisonment and a fine of $25,000, but failed to describe the mandatory special parole of at least three years. The district court accepted the guilty plea, and, at a later proceeding, sentenced the defendant to ten years imprisonment, a $5,000 fine, and a special parole term of five years. No objection was made and no appeal was taken from the judgment.

Two years later, the defendant moved to vacate the sentence pursuant to 28 U.S.C. §2255 on the ground that the trial court violated the terms of Rule 11. There was no contention by the defendant that he did not know of the

mandatory parole or that he would not have pleaded guilty had he known of the mandatory parole. Timmreck's only claim was a technical violation of Rule 11, which could have been raised by direct appeal since he became aware of the mandatory parole term at the time of sentencing and, therefore, at a time when he could have appealed.

Unlike defendant Timmreck, the respondents herein were unaware of the mandatory special parole term until well after they arrived at their designated institutions. Unlike Timmreck, they were not informed at sentencing that they were being sentenced to a mandatory parole term. This Court in Timmreck held only that a claim that could have been raised on direct appeal, should have been so raised. The principle of Timmreck, that collateral relief under 18 U.S.C. §2255 is not available "to do service for an appeal," simply does not apply to this case. Finally, there was no prejudice to defendant Timmreck from the failure to comply with the formal requirements of Rule 11. Timmreck was aware of the parole term at the time of sentencing. In the instant case, however, respondents were subjected to a substantially greater term than their actual sentence. Such an error is not a technical violation. but rather a violation of the constitutional right to due process.

Moreover, fundamental fairness demands that this Court uphold respondents' right to have the State live up to its bargains. Nothing in United States v. Timmreck, supra, indicates that there was any agreement in that case. United States ex rel. Baker v. Finkbeiner, 551 F. 2d 180, 183 (7th Cir. 1977). Both respondents here, however, entered plea agreements. Respondent Lawrence

Williams agreed to plead guilty to a single charge of burglary in exchange for an indeterminate sentence of one to two years. At the trial court's request, the state's attorney recited the terms of the agreement in open court. The court elicited respondent Williams' understanding and acceptance of the terms of the agreement (L. Williams, R. 6, Ex. A, pp. 3-4), and ratified its terms (L. Williams, R. 6, Ex. A, p. 5). There was no mention by any person of the existence of a mandatory parole term. Yet, Williams received a sentence of from one to two years, followed by a three year parole term

Similarly, respondent Southall agreed to plead guilty under the terms of a plea agreement in exchange for an indeterminate sentence of from one to three years. The agreement was reached in the presence of the trial judge, who indicated he would so sentence respondent Southall (O. Southall, R.6., Ex. A, pp. 2, 5, 6). Again, the existence of a mandatory parole term was never mentioned. Yet, like Williams, Southall received a sentence of one to two years in prison, which he later learned would be followed by a three year parole term.

Petitioner suggests here that finality of judgments is more crucial to the integrity of our system of justice than notions of fundamental fairness in compelling the State to adhere to its agreements. That argument was properly rejected by both the District Court and a unanimous panel of the Court of Appeals. It is wholly consistent with this Court's decision in Timmreck, which held, quoting from Hill v. United States, 368 U.S. 424 (1962):

> We decide only that such collateral relief is not available when all that is shown is a failure to comply with the formal requirements of the Rule. [Emphasis added.] 368 U.S. at 429.

Petitioner does not, and cannot, suggest that all that is involved in the instant case are "mere technical violations." Thus, United States v. Timmreck, supra, rests on a "wholly different" factual basis, as the Court of Appeals found, and has no application to the instant case.

## II.

### The Court of Appeals Did Not Err In Applying The Decision In United States ex rel. Baker v. Finkbeiner Retroactively

In United States ex rel. Baker v. Finkbeiner, 551 F. 2d 180 (7th Cir. 1977), the Court of Appeals for the Seventh Circuit held that failure to advise a state criminal defendant that a mandatory parole term automatically attached to his sentence violated the due process clause of the Fourteenth Amendment, and rendered his guilty plea involuntary. In Baker, the petitioner agreed to plead guilty to criminal charges in accordance with a plea agreement negotiated by petitioner's attorney and the state's attorney, and ratified by the trial judge. Before accepting the plea, the trial judge informed the defendant of the statutory range of penalties on the pending charges and told him that his sentence would conform to the plea agreement. The judge failed to mention any mandatory parole period. Neither the prosecutor nor defendant's attorney remedied this omission.

Defendant was imprisoned, served his sentence, and was released on parole. After violating parole, he was imprisoned for an additional term in excess of his original sentence. The Court held that since the defendant was

given a substantially more onerous sentence than the one for which he had bargained, his guilty plea had been unfairly induced. The full consequences of his plea had not been made clear. The court did not, however, vacate the guilty plea since vacating the plea would have permitted the State to reprosecute the defendant who had already performed his part of the bargain by serving his original sentence exclusive of mandatory parole. Instead, the court ordered the petitioner released, extinguishing his undisclosed parole obligation.

Petitioner contends that the Baker doctrine should not be applied retroactively, arguing:

(1) Baker set forth a new and unexpected rule of procedure and is therefore not entitled to retroactive application;

(2) Only procedures which affect the integrity of the fact-finding process should be applied retroactively;

(3) Under other case law establishing a balancing test, Baker ought not to be retroactively applied.

Respondents submit that none of these arguments is valid.

First, the Baker decision did not enunciate a new rule of constitutional law. The principle that a defendant should possess a "full understanding of the consequences of a guilty plea" was first enunciated more than fifty years ago in Kercheval v. United States, 274 U.S. 220, 223 (1927). This principle was reiterated in Boykin v. Alabama, 395 U.S. 238 (1969), and Santobello v. New York, 404 U.S. 257 (1971). In Boykin, this Court held that where there is a guilty plea in a state criminal trial, "what is at stake . . . demands the utmost solicitude of which courts are capable in canvassing the matter with the accused to make sure

he has a full understanding of what the plea connotes and its consequences." 395 U.S. 238, 243-244. Boykin predates the first guilty plea in the instant case by nearly four years.

In Santobello, recognition of a prosecutor's duty concerning promises made in negotiating guilty pleas was held to require specific performance of a plea bargain or leave to withdraw a plea of guilty:

> When a plea rests in any significant degree on a promise or agreement of the prosecutor, so that it can be said to be a part of the inducement or consideration, such promise must be fulfilled. 404 U.S. 257 at 263.

Santobello also predates all of the guilty pleas herein.

Baker was thus not unexpected. Baker, relying on Boykin and Santobello, merely "represents the application of existing precedent to particular and somewhat different facts." United States ex rel. Williams v. Morris, 447 F. Supp. 95, 106 (N.D. Ill. 1978).

> Retroactivity questions are presented only where a decision establishes a new principle of law, . . . either by overruling clear past precedent on which litigants may have relied, . . . or by deciding an issue of first impression whose resolution was not clearly foreshadowed. United States ex rel. Williams v. Morris, 447 F. Supp. 95, 105, quoting Chevron Oil Co. v. Huson, 404 U.S. 97, 106 (1971).

Even assuming, arguendo, that Baker established a new rule of procedure, full retroactivity, as a threshold matter, is available where the new rule remedies a significant or substantial defect in the fact-finding process at trial, raising serious questions about the accuracy of guilty verdicts or where the new rule accords constitutional immunity to conduct which was previously penalized. Petitioner, however, incorrectly asserts that failure to admonish as to

mandatory parole bears no relationship to the integrity of the fact-finding process of a criminal trial. Rather, less than full disclosure of the consequences of a guilty plea may make the difference between a bargained-for guilty plea and a trial.

> A defendant with a colorable defense to the charge made against him may evaluate a guilty plea differently if he faces a straight one year sentence rather than one year plus three years of mandatory parole. His decision to forego trial may be affected and the outcome of that bypassed trial might have been favorable to him. United States ex rel. Williams v. Morris, 447 F. Supp. 95, 106.

There can be no greater defect in the fact-finding process at trial than that it took place because of an improperly induced plea of guilty. If that plea is entered without disclosure of a material factor detrimental to the party pleading guilty, there is serious doubt as to its accuracy.

Petitioner's argument against retroactivity goes one step further. If Baker is (1) a new rule of procedure and (2) not related in any manner to the integrity of the fact-finding process, then the applicable test for determining retroactivity is a balancing process. Assuming, arguendo, that petitioner is correct, Baker should nevertheless be applied retroactively. Three factors are generally looked to: (1) the purpose of the new rule; (2) the extent of reliance upon the old rule; and (3) the effect retroactive application would have upon the administration of justice. Stovall v. Denno, 388 U.S. 293, 297 (1967).

The purpose of the rule in Baker is twofold: (1) it assures that a defendant entering a guilty plea has a full understanding of the consequences of his decision, Boykin v. Alabama, 395 U.S. 238 (1969); and (2) it assures

fundamental fairness in the plea bargaining process by compelling the State to keep its promises, Santobello v. New York, 404 U.S. 257 (1971). Both purposes are significant. The integrity of the fact-finding process rests on the premise that all parties have a full understanding of the consequences of their acts. Second, an agreement to enter a plea of guilty and waive the panoply of rights attendant to an accusation of criminal deeds must bear consideration from the charging party, the State. If the State is allowed subsequently to change the terms of its commitment at will, the consideration fails. The original terms of the agreement must be enforced, and can only be enforced by retroactive application of the Baker decision.

Respondents submit that the purposes of Baker clearly favor retroactivity and that there is no need to examine the remaining two factors. Assuming, arguendo, that such an examination is necessary, those factors also weigh in favor of retroactive application. Petitioner submits that Illinois courts have relied extensively on Illinois Supreme Court Rule 402 prior to the decision in People v. Wills, 61 Ill. 2d 105 (1975). Petitioner further submits there was no reason to expect a decision which would require that a defendant be fully advised of all the consequences of his plea. This contention is belied by the decision in Boykin v. Alabama, 395 U.S. 238 (1969), decided a full six years prior to People v. Wills, by the decision of the Illinois Supreme Court in People v. Washington, 38 Ill. 2d 446 (1967) (a plea of guilty induced by unfulfilled promises loses its voluntary nature), and by the decision of this Court four years later in Santobello v. New York, 404 U.S. 257 (1971).

Finally, petitioner's in terrorem argument that retroactive application of Baker will have a devastating effect on the administration of justice is groundless. The District Court met this problem, United States ex rel. Williams v. Morris, 447 F. Supp. 95, 107-108 (N.D. Ill. 1978). That resolution was adopted by the Court of Appeals, United States ex rel. Williams v. Morris, 633 F. 2d 71, 77 (7th Cir. 1980). Both courts rejected petitioner's argument. Significantly, these courts, particularly the District Court, would bear much of the brunt of the alleged onslaught of litigation. In fact, a class action is now pending before the District Court in United States ex rel. Chester Flowers v. Illinois Parole & Pardon Board, 78 C 1000. Both courts correctly held that the constitutionally invalid portion of the sentence could be isolated and excised without requiring the State to begin the fact-finding process anew, quoting Robinson v. Neil, 409 U.S. 505, 509-510. The decision of the Court of Appeals should be affirmed.

## CONCLUSION

For the foregoing reasons, respondents pray that this Court deny the Petition for Writ of Certiorari herein.

Respectfully submitted,

Martha A. Mills
Sue Anne Herrmann
Attorneys for Respondents

Of Counsel:

Cotton, Watt, Jones, King & Bowlus
Suite 4750, One IBM Plaza
Chicago, Illinois 60611
(312) 467-0590

## CERTIFICATE OF SERVICE

I certify that I have personally had this day mailed, by first class mail, postage prepaid, from a United States mail depository located at One IBM Plaza, Chicago, Illinois, a copy of the foregoing Response to Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit to:

Michael B. Weinstein
Assistant Attorney General
188 W. Randolph Street
Suite 2200
Chicago, Illinois 60601

Sue Anne Herrmann

Dated: April 16, 1981

Subscribed and sworn to before me
this 16th day of April, 1981.

Notary Public

No. 80-1240

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IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1980

GAYLE FRANZEN,

Petitioner,

v.

LAWRENCE WILLIAMS and OSCAR SOUTHALL,

Respondents.

MOTION FOR LEAVE TO FILE
IN FORMA PAUPERIS

Respondents, Lawrence Williams and Oscar Southall, ask leave to file their response to the Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit without prepayment of costs and to proceed in forma pauperis pursuant to Rule 46 (1) of the Rules of the Supreme Court of the United States.

In support thereof, respondents state that respondents sought leave to file in forma pauperis in the United States District Court for the Northern District of Illinois, and in the United States Court of Appeals for the Seventh Circuit under the Criminal Justice Act of 1964, as amended. Such leave was granted by both courts, and Martha A. Mills was appointed by both courts to act as counsel for respondents.

Respectfully submitted,

Martha A. Mills

Martha A. Mills
Attorney for Respondents

Of Counsel:

Cotton, Watt, Jones, King & Bowlus
Suite 4750, One IBM Plaza
Chicago, Illinois 60611
(312) 467-0590

## CERTIFICATE OF SERVICE

I certify that I have personally had this day mailed, by first class mail, postage prepaid, from a United States mail depository located at One IBM Plaza, Chicago, Illinois, a copy of the foregoing Response to Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit to:

Michael B. Weinstein
Assistant Attorney General
188 W. Randolph Street
Suite 2200
Chicago, Illinois 60601

Sue Anne Herrmann

Dated: April 16, 1981

Subscribed and sworn to before me
this 16th day of April, 1981.

Notary Public

Office-Supreme Court, U.S.
FILED
AUG 24 1981
ALEXANDER L. STEVAS,
CLERK

No. 80-1240

# In the Supreme Court of the United States

OCTOBER TERM, 1980

MICHAEL P. LANE, Director,
Illinois Department of Corrections,

Petitioner,

v.

LAWRENCE WILLIAMS and
OSCAR SOUTHALL,

Respondents.

## ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

## BRIEF FOR THE PETITIONER

TYRONE C. FAHNER
Attorney General of the
State of Illinois
HERBERT L. CAPLAN
MELBOURNE A. NOEL, JR.
MICHAEL B. WEINSTEIN
ASSISTANT ATTORNEYS GENERAL
188 W. RANDOLPH STREET
SUITE 2200
CHICAGO, ILLINOIS 60601
(312) 793-2570

*Counsel for Petitioner*

Printed by the Authority of the State of Illinois — 8-19-81

## QUESTION PRESENTED FOR REVIEW

Whether the decision of the United States Court of Appeals for the Seventh Circuit conflicts with this Court's recent decision in *United States v. Timmreck* and thereby goes beyond the due process requirements previously enunciated by this Court pertaining to "knowing and voluntary" guilty pleas.

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No. 80-1240

# In the Supreme Court of the United States

OCTOBER TERM, 1980

MICHAEL P. LANE, Director,
Illinois Department of Corrections,

Petitioner,

v.

LAWRENCE WILLIAMS and
OSCAR SOUTHALL,

Respondents.

## ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

## BRIEF FOR THE PETITIONER

### OPINIONS BELOW

In *United States ex rel. Williams v. Morris*, 633 F.2d 71 (7th Cir. 1980) (reproduced in the Joint Appendix at J.A. 45-55), the Seventh Circuit Court of Appeals affirmed in part, and reversed in part, the decision and judgment of the United States District Court, Northern District of Illinois,

Eastern Division, which had granted respondents' applications for Writs of Habeas Corpus.[1] *United States ex rel. Williams v. Morris*, 483 F. Supp. 775 (N.D. Ill. 1980).

As was noted in the court of appeals' decision, the Petitions for Writs of Habeas Corpus had been consolidated in the district court, which originally ruled in favor of the respondents in 1978. The district court's ruling was based upon a finding that respondents' fourteenth amendment due process rights were violated by the failure to inform them of a three year mandatory parole term which would automatically attach to the penitentiary sentences which they received as part of their negotiated plea agreements. *United States ex rel. Williams v. Morris*, 447 F. Supp. 95 (N.D. Ill. 1978) (hereinafter referred to as "*Williams I*"). Subsequently, however, the court of appeals reversed that decision, holding that respondents had failed to exhaust an available state court remedy. *United States ex rel. Williams v. Morris*, 594 F.2d 614 (7th Cir. 1979).

Upon remand to the district court, respondents renewed their requests for expungement of their mandatory parole terms, contending that an intervening Illinois Supreme Court decision conclusively demonstrated that resort to the state courts was futile. The district court agreed and, for the reasons set forth in *Williams I*, granted the relief sought. *United States ex rel. Williams v. Morris*, 483 F. Supp. 776 (N.D. Ill. 1980) (hereinafter referred to as "*Williams II*"). It is from the court of appeals' partial affirmance of *Williams II* (J.A. 45-55) that the petitioner now appeals.

---

[1] Since the court of appeals ruled in favor of petitioner with regard to a third individual (*i.e.*, Emanuel Williams), review has not been sought as the decision pertains to him. *See* Supreme Court Rule 21.1(b).

## JURISDICTION

The court of appeals' decision was rendered on October 22, 1980. No Petition for Rehearing was filed in that court. The Petition for Writ of Certiorari was filed within 90 days of the date of the court of appeals' decision as per 28 U.S.C. §2101(c). This Court granted the Petition for Writ of Certiorari on June 8, 1981. 49 U.S.L.W. 3911 (U.S. June 8, 1981).[2]

The jurisdiction of this Court rests upon 28 U.S.C. §1254(1).

## CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The fourteenth amendment to the Constitution of the United States provides, in pertinent part, that:

> No State shall . . . deprive any person of life, liberty, or property, without due process of law; . . . .

*Ill. Rev. Stat.*, 1975, ch. 38, §1003-3-9(a) provides, in pertinent part, that:

> If prior to expiration or termination of the term of parole, the parolee violates a condition of parole, the Parole and Pardon Board may:
>
> (1) continue the existing parole, with or without modifying or enlarging the conditions; or

---

[2] This case was originally entitled *Franzen v. Williams and Southall*. However, on January 20, 1981 (ironically, the date on which the Petition for Writ of Certiorari was filed in this Court), Gayle Franzen resigned as Director of the Illinois Department of Corrections and was replaced by Michael P. Lane. Director Lane's name has been substituted on all subsequent pleadings pursuant to directions from the Clerk's office.

(2) parole the person to a half-way house; or

(3) revoke the parole and reconfine the person for a term computed in the following manner:

(i) the recommitment shall be for that portion of the imposed maximum term of imprisonment or confinement which had not been served at the time of parole, less the time elapsed between the parole of the person and the commission of the violation for which parole was revoked, and, in addition, if the person was sentenced on or after the effective date of this Act the parole term; and

(ii) the person shall be given credit against the term of reimprisonment or reconfinement for time spent in custody since he was paroled which has not been credited against another sentence or period of confinement.

*Ill. Rev. Stat.*, 1975, ch. 38, §1005-8-1(e) provides that:

Every indeterminate sentence shall include as though written therein a parole term in addition to the term of imprisonment. Subject to earlier termination under Section 3-3-8, the parole term shall be as follows:

(1) for murder or a Class 1 felony, 5 years;

(2) for a Class 2 felony, or a Class 3 felony, 3 years;

(3) for a Class 4 felony, 2 years.[3]

---

[3] It should be noted that effective February 1, 1978, Illinois abolished indeterminate sentencing. The expression "Mandatory Parole Term" has now been replaced by the words "Mandatory Supervised Release Term" and the length of the term was reduced as follows:

(1) for murder or a Class X felony, 3 years;
(2) for a Class 1 felony or a Class 2 felony, 2 years;
(3) for a Class 3 felony or a Class 4 felony, 1 year.

*continued on next page*

*Ill. Rev. Stat.*, 1975, ch. 110A, §402 provides, in pertinent part, that:

> In hearings on pleas of guilty, there must be substantial compliance with the following:
>
> (a) ADMONITIONS TO DEFENDANT. The court shall not accept a plea of guilty without first, by addressing the defendant personally in open court, informing him of and determining that he understands the following:
>
> (1) the nature of the charge;
>
> (2) the minimum and maximum sentence prescribed by law, including, when applicable, the penalty to which the defendant may be subjected because of prior convictions or consecutive sentences;
>
> (3) that the defendant has the right to plead not guilty, or to persist in that plea if it has already been made, or to plead guilty; and
>
> (4) that if he pleads guilty there will not be a trial of any kind, so that by pleading guilty he waives the right to a trial by jury and the right to be confronted with the witnesses against him.
>
> (b) DETERMINING WHETHER THE PLEA IS VOLUNTARY. The court shall not accept a plea of guilty without first determining that the plea is voluntary. If the tendered plea is the result of a plea agreement, the agreement shall be stated in open court. The court, by

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*continued from previous page*

*Ill. Rev. Stat.*, 1979, ch. 38, §1005-8-1(d). While the name has been changed, the effects of the term are basically the same. *See Ill. Rev. Stat.*, 1979, ch. 38, §1003-3-9(a)(3)(i)(A) and (B). For purposes of simplicity and, in line with the provisions of §1005-8-1(d), petitioner will use the expression "Mandatory Parole Term" throughout the remainder of this brief.

questioning the defendant personally in open court, shall confirm the terms of the plea agreement, or that there is no agreement, and shall determine whether any force or threats or any promises, apart from a plea agreement, were used to obtain the plea.

(c) DETERMINING FACTUAL BASIS FOR PLEA. The court shall not enter final judgment on a plea of guilty without first determining that there is a factual basis for the plea.

(d) PLEA DISCUSSIONS AND AGREEMENTS. When there is a plea discussion or plea agreement, the following provisions, in addition to the preceding paragraphs of this rule, shall apply:

(1) The trial judge shall not initiate plea discussions.

(2) If a tentative plea agreement has been reached by the parties which contemplates entry of a plea of guilty in the expectation that a specified sentence will be imposed or that other charges before the court will be dismissed, the trial judge may permit, upon request of the parties, the disclosure to him of the tentative agreement and the reasons therefor in advance of the tender of the plea. At the same time he may also receive, with the consent of the defendant, evidence in aggravation or mitigation. The judge may then indicate to the parties whether he will concur in the proposed disposition; and if he has not yet received evidence in aggravation or mitigation, he may indicate that his concurrence is conditional on that evidence being consistent with the representations made to him. If he has indicated his concurrence or conditional concurrence, he shall so state in open court at the time the agreement is stated as required by paragraph (b) of this rule. If the defendant thereupon pleads guilty, but the trial judge later withdraws his concurrence or conditional concurrence,

> he shall so advise the parties and then call upon the defendant either to affirm or to withdraw his plea of guilty. If the defendant thereupon withdraws his plea, the trial judge shall recuse himself.
>
> (3) If the parties have not sought or the trial judge has declined to give his concurrence or conditional concurrence to a plea agreement, he shall inform the defendant in open court at the time the agreement is stated as required by paragraph (b) of this rule that the court is not bound by the plea agreement, and that if the defendant persists in his plea the disposition may be different from that contemplated by the plea agreement . . . .

## STATEMENT OF THE CASE

The factual situations in each of the two cases are set forth below according to the names of each of the respondents involved.

### LAWRENCE WILLIAMS

On March 11, 1975, respondent Lawrence Williams pled guilty in the Circuit Court of Cook County, Illinois (No. 74-3339) to a single charge of burglary. At that time, burglary carried a penalty of one to twenty years imprisonment followed by three years mandatory parole. *Ill. Rev. Stat.*, 1975, ch. 38, §§19-1, 1005-8-1(b)(3), 1005-8-1(c)(3), 1005-8-1(e)(2). Under the terms of a plea agreement between Williams' public defender and the prosecutor, Williams was to receive an indeterminate sentence of from one to two years in prison.

Before accepting the plea, the trial judge admonished the defendant of the consequences of his plea. (J.A. 23-31) He

had the prosecutor repeat the terms of the plea bargain in open court and elicited Williams' understanding and acceptance of its terms. (J.A. 24) The trial judge also indicated that, pursuant to the plea agreement, the court had agreed to accept the sentencing recommendation of the State, conditioned upon the truth of the factual information supplied to the court concerning the defendant. (J.A. 25) The transcript contains no statement by the court, the prosecutor or the public defender that the recommended sentence included a mandatory parole term.

The judge then received Williams' acknowledgement that he understood the nature of the charges and understood his constitutional rights to remain silent, to be tried before a jury, to be proven guilty beyond a reasonable doubt, and to confront and cross-examine witnesses. (J.A. 25-28) A factual basis for the plea was established and Williams indicated that he understood that by pleading guilty he admitted those facts. (J.A. 28-29) The trial judge then described the potential statutory penalty for the charged offense, omitting any mention of a mandatory parole term. (J.A. 29-30) After hearing evidence in aggravation and mitigation, the trial court sentenced Williams to not less than one nor more than two years in prison.

Lawrence Williams was imprisoned until May 20, 1976, when he was released on parole having served approximately seventeen months in prison. Williams stated in his Petition for Writ of Habeas Corpus that he was unaware that a mandatory parole term attached to his sentence until approximately two months prior to his discharge. (J.A. 12) While serving his three year mandatory parole term, respondent was arrested and subsequently found to be a parole violator. Williams had been reincarcerated at Stateville Correctional Center, Joliet, Illinois, when the original Writ of Habeas Corpus was issued. *See Williams I*, 447 F. Supp. at 100. Before the denial of a

Motion to Reconsider in *Williams I* took effect, the respondent was released on six months mandatory release under supervision pursuant to *Ill. Rev. Stat.*, 1977, ch. 38, §1003-3-10(b)(2) on February 1, 1978. Williams' period of mandatory release expired on August 1, 1978, at which time he was released from the custody of the Illinois Department of Corrections. In sum, respondent served approximately twenty-eight months in prison.

## OSCAR SOUTHALL

On March 19, 1975, respondent Southall, like respondent Williams, pled guilty in the Circuit Court of Cook County, Illinois (No. 75-228) to one count of burglary. At that time, burglary carried the same penalty of one to twenty years imprisonment followed by three years mandatory parole. *Ill. Rev. Stat.*, 1975, ch. 38, §§19-1, 1005-8-1(b)(3), 1005-8-1(c)(3), 1005-8-1(e)(2). Pursuant to a plea agreement between Southall's public defender and the prosecutor, Southall was to receive an indeterminate sentence of from one to three years. This agreement was reached at a conference in which the trial judge was present and had indicated that he would sentence the defendant to one to three years. (J.A. 74-77)

The transcript reveals that neither the trial judge nor the attorneys disclosed the existence of the mandatory parole term during their discussion of either the plea agreement or the possible sentence which could be imposed.

The trial judge explained to Southall that by pleading guilty he waived his constitutional rights to a trial by jury and to confront and cross-examine witnesses. (J.A. 75) The judge received Southall's acceptance and acknowledgement of these consequences. (J.A. 75) Southall responded negatively to the

question of whether his guilty plea had been induced by force, duress, threats or promised rewards. (J.A. 76) The judge next described his conversation with Judge Strzalka, who had previously placed Southall on two years probation in May, 1974, for an earlier offense. After being advised of the pending charge and the plea negotiations, Judge Strzalka reportedly stated that if Southall pled guilty to the burglary charge, he (Judge Strzalka) would either find a violation of probation and impose a concurrent sentence for the same term, or would order the probation revoked and terminated as being unsatisfactory. (J.A. 76-77)[4]

The trial judge then stated that as a result of a pretrial conference, the court would impose the sentence which had been discussed. (J.A. 77) Finally, after establishing a sufficient factual basis for the plea, the trial court accepted the guilty plea and sentenced Southall to an indeterminate term of one to three years in prison. (J.A. 77-79)

Southall was imprisoned until September 22, 1975, when he completed his prison sentence (less time off for good behavior) and was released on parole having served approximately eleven months in prison. He was declared a parole violator on October 8, 1976, and was reincarcerated pursuant to the three year mandatory parole provisions implicit in his original sentence. Respondent Southall was subsequently reparoled and totally discharged from the custody of the Illinois Department of Corrections as of October 24, 1979. He had served approximately twenty-three months in prison for his original conviction.

As previously noted, both Williams and Southall subsequently filed Petitions for Writs of Habeas Corpus, pursuant

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[4] At the probation revocation hearing held on June 10, 1976, Judge Strzalka chose the latter course and terminated Southall's probation as being unsatisfactory.

to 28 U.S.C. §2254, in the United States District Court, Northern District of Illinois, Eastern Division. (J.A. 9-17, 62-70) These Petitions were granted by the district court (*Williams I*); reversed and remanded by the court of appeals for failure to exhaust an available state court remedy [*United States ex rel. Williams v. Morris*, 594 F.2d 614 (7th Cir. 1979)]; and again granted by the district court in *Williams II*. It is from the court of appeals' partial affirmance of *Williams II* that the petitioner now appeals.

## SUMMARY OF ARGUMENT

This Court, in its recent decision in *United States v. Timmreck*, 441 U.S. 780 (1979), held that collateral relief is not available when all a defendant shows is a failure of a trial court to comply with the formal requirements of a rule governing the entry of guilty pleas. *Timmreck* dealt with the failure of a district court to admonish a defendant as to the mandatory special parole term required by 21 U.S.C. §841(b)(1)(A).

*Timmreck* involved an application of 28 U.S.C. §2255 while the instant case involves an application of 28 U.S.C. §2254. However, the two statutes are sufficiently similar in content, and in application, so as to allow the rationale of *Timmreck* to be applied herein.

Factually, the *Timmreck* case and this case are very similar. Both cases concern pleas entered as a result of plea bargaining agreements. In both cases, the defendants failed to directly appeal their convictions. While it is true that the respondents in this case, unlike Timmreck, have indicated that they were each unaware of the existence of the parole terms at the time of the entry of their respective guilty pleas, their failure to allege that they would not have pled guilty had they been aware of the parole term is the more important concern. Finally, the combined prison and parole terms given to

each respondent were within the maximum penalty which could have been assessed and the record reflects the respondents' awareness of that fact. Thus, their allegations are, in reality, no different than the "technical violation" found insufficient to warrant collateral relief in *Timmreck*.

The flaw in the court of appeals' reasoning is its failure to understand that the lack of an admonishment as to the mandatory parole term is, at most, a failure to comply with the dictates of a state rule of criminal procedure. Indeed, the Illinois Supreme Court has held that the failure to admonish, while "a factor to be considered in determining whether a plea of guilty was voluntarily and intelligently made" [*People v. Wills*, 61 Ill.2d 105, 330 N.E.2d 505, 508 (1975)], does not, in and of itself, involve a "constitutional issue or standard."

The Illinois mandatory parole term operates in a manner quite similar to the mandatory special parole term provided for in 21 U.S.C. §841(b). This Court has found, in *Timmreck*, that the lack of an admonishment as to the federal parole term is neither "constitutional nor jurisdictional." *United States v. Timmreck*, *supra* at 783. This Court must therefore conclude that a similar failure to admonish as to the Illinois mandatory parole term cannot be collaterally attacked under 28 U.S.C. §2254 since habeas relief, for purposes of this case, is limited to constitutional violations.

This Court has recognized the benefits to the criminal justice system from guilty pleas and plea bargains. However, those benefits can be secured only if such pleas are accorded "a great measure of finality." *Blackledge v. Allison*, 431 U.S. 63, 71-72 (1977). Moreover, the well-established principles of comity and federalism are especially important when considered in connection with a §2254 proceeding.

This Court held in *Timmreck* that failure to admonish as to the special mandatory parole term is neither "constitutional

nor jurisdictional". This same finding should be applied to the states for purposes of a §2254 proceeding. Therefore, the judgment of the court of appeals, granting the writs, should be reversed.

## ARGUMENT

### THE COURT OF APPEALS' DECISION IN THIS CASE CONFLICTS WITH THIS COURT'S RECENT DECISION IN *UNITED STATES v. TIMMRECK* AND THEREBY GOES BEYOND THE DUE PROCESS REQUIREMENTS PREVIOUSLY ENUNCIATED BY THIS COURT PERTAINING TO "KNOWING AND VOLUNTARY" GUILTY PLEAS.

#### A. The Rationale of *Timmreck* Should Be Applied To The Instant Case.

This Court, in its recent decision in *United States v. Timmreck*, 441 U.S. 780 (1979), ruled that a federal offender may not receive collateral relief from a guilty plea based upon a failure to advise him of the mandatory special parole term required by 21 U.S.C. §841(b)(1)(A). In *Timmreck*, the defendant, acting on advice of counsel, pled guilty to a charge of conspiracy to distribute various controlled substances. As required by Fed. Rules Cr. Proc. Rule 11 [18 U.S.C.A. (1966)[5]],

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[5] At the time of Timmreck's guilty plea, Rule 11 provided:

> A defendant may plead not guilty, guilty or, with the consent of the court, *nolo contendere*. The court may refuse to accept a plea of guilty, and shall not accept such plea or a plea of *nolo contendere* without first addressing the defendant personally and determining that

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the district judge formally addressed the defendant and determined that there was a factual basis for the plea and that the plea was being made voluntarily. The judge admonished the defendant that he could receive a sentence of up to 15 years imprisonment and a $25,000 fine; however, he failed to advise the defendant of the mandatory special parole term of at least three years.

The district judge accepted the guilty plea and, at a later proceeding, sentenced the defendant to 10 years imprisonment, plus a mandatory special parole term of 5 years, and a fine of $15,000. Pursuant to a plea bargain with the prosecutor, other charges against the defendant were dismissed. No objection to the sentence was raised at that time and the defendant did not take a direct appeal from his conviction.

Approximately two years later, the defendant moved to vacate the sentence pursuant to 28 U.S.C. §2255 on the ground that the trial judge had violated Rule 11 by accepting his plea without informing him of the mandatory special parole term. Following an evidentiary hearing, the district court denied Timmreck's motion. *Timmreck v. United States*, 423 F.Supp. 537 (E.D. Mich. 1976). The district court recognized that a violation of Rule 11 had occurred but concluded that collateral relief was not justified since the defendant had received a sentence within the maximum described to him at the time the guilty plea was accepted and thus had not suffered any prejudice. 423 F.Supp. at 539-540.

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> the plea is made voluntarily with understanding of the nature of the charge and the consequences of the plea.

Rule 11 has since been modified so as to make explicit what was meant by "the nature of the charge and the consequences of the plea." *See* Fed. Rules Cr. Proc. Rule 11 [18 U.S.C.A. (1975)].

The Sixth Circuit Court of Appeals reversed. *Timmreck v. United States*, 577 F.2d 372 (6th Cir. 1978). That court held that a violation of Rule 11 will support a collateral attack on a guilty plea even where there is neither constitutional error nor any showing of prejudice to the defendant. *Id.* at 375-377.

This Court reversed the Sixth Circuit's decision in a unanimous opinion authored by Mr. Justice Stevens. The gist of this Court's holding was that a violation of Rule 11 is neither constitutional nor jurisdictional. The opinion went on to state that:

> Nor can any claim reasonably be made that the error here resulted in a "complete miscarriage of justice" or in a proceeding "inconsistent with the rudimentary demands of fair procedure." [*Hill v. United States*, 368 U.S. 424, 428 (1962).] Respondent does not argue that he was actually unaware of the special parole term or that, if he had been properly advised by the trial judge, he would not have pleaded guilty.

*United States v. Timmreck*, 441 U.S. at 784.

*Timmreck* thus holds that collateral relief is not available when all a defendant shows is a failure of a trial court to comply with the formal requirements of a rule governing the entry of guilty pleas.

Petitioner is, of course, aware of the fact that *Timmreck* was decided pursuant to 28 U.S.C. §2255 while the instant case involves an application of 28 U.S.C. §2254. It is submitted, however, that the two statutes are sufficiently similar in content, and in application, so as to allow the rationale of *Timmreck* to be applied to a §2254 proceeding.[6]

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[6] Note, *Developments in the Law — Federal Habeas Corpus*, 83 Harv. L. Rev. 1038 (1970) at 1040, n. 1 ("State prisoners seek relief by habeas corpus under 28 U.S.C. §2241 *et. seq.* (1964). Federal

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As was true in *Timmreck*, the two pleas entered herein were the result of plea bargains. (J. A. 24-25, 74-77); *United States v. Timmreck*, 441 U.S. at 782.[7] Similarly, neither respondent herein appealed his conviction to the Illinois reviewing courts. *Williams* I, 447 F.Supp. at 97. Indeed, neither respondent has attempted to invoke *any* state legal

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prisoners technically utilize a motion to vacate judgment under 28 U.S.C. §2255 (1964). These two remedies are equivalent for most purposes ... except where section 2255 presents special problems.")

This Court has noted, is a slightly different context, that the scope of review in a §2254 case is a "narrow one of due process" and that it entails only those claims which constitute a "failure to observe that fundamental fairness essential to the very concept of justice." *Donnelly v. DeChristoforo*, 416 U.S. 637, 642 (1974). Petitioner, therefore, submits that the *Donnelly* standard is analagous to the §2255 standard of a "complete miscarriage of justice" or a proceeding "inconsistent with the rudimentary demands of fair procedure." *See Hill v. United States*, 368 U.S. 424, 428 (1962); *see also, Wainwright v. Sykes*, 433 U.S. 72 (1977) and *United States v. Hayman*, 342 U.S. 205, 217 (1952).

[7] It is unclear whether the trial judge in *Timmreck* was a party to the plea bargain discussions. Rule 11 as presently constituted would appear to preclude such involvement. Fed. Rules Cr. Proc. Rule 11(e) [18 U.S.C.A. (1975)]. The Notes of the Advisory Committee on Rules state that:

> It is contemplated that the judge may participate in such discussions as may occur when the plea agreement is disclosed in open court. This is the position of the recently adopted Illinois Supreme Court Rule 402(d)(1) (1970). (Citation omitted).

*continued on next page*

remedy. *Id.*[8] It was not until two years after their pleas that the respondents filed habeas corpus petitions in federal district court. (J.A. 4, 58). While it is true that each respondent argues that he was unaware of the existence of the mandatory parole term at the time of the entry of his guilty plea (J.A. 12, 65), it is important to note that neither respondent has alleged that he would not have pled guilty had he been properly advised of the term. (J.A. 11-13, 65-66). Finally, the combined prison and parole terms given to each respondent were within the maximum penalty which could have been assessed and the record reflects the respondents' awareness of that fact. (J.A. 30, 74-75).[9] Thus, their allegations are, in

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Fed. Rules Cr. Proc. Rule 11 [18 U.S.C.A. (1975) at 25].

The trial judge in the Williams case appears to have followed the dictates of Supreme Court Rule 402(d) (J.A. 23-25). (The Petition for Writ of Certiorari erroneously stated that "The trial judge was a party to the conference at which the plea agreement was finally struck." Petition for Writ of Certiorari at 4. Further review of the transcript indicates that the judge was a "party" to the discussions between the prosecutor and defense counsel only in the sense that he knew of the results prior to the discussion in open court.) The trial judge in the Southall case, however, appears to have actually participated in the plea discussions (J.A. 74-77).

[8] As noted in the Court of Appeals' decision in *Williams* II, the exhaustion issue was not renewed by petitioner in that proceeding since neither of the respondents were in the custody of the Illinois Department of Corrections and, therefore, were precluded by Illinois law from filing a postconviction petition. (J.A. 46, n.2)

[9] Respondent Williams served approximately twenty-eight months in prison or four months more than the actual maximum sentence given to him while respondent Southall served a total of only twenty-three months of actual imprisonment as opposed to the three year maximum sentence imposed in his case.

reality, no different from those found to constitute merely a "technical violation", insufficient to warrant collateral relief, in *Timmreck*. However, the court of appeals' decision in the instant case as well as its previous decision in the case of *United States ex rel. Baker v. Finkbeiner*, 551 F.2d 180 (7th Cir. 1977) has had the effect of requiring mandatory parole term admonishments prior to the entry of all guilty pleas in order to comply with the due process requirements of the federal constitution.

### B. The Failure To Admonish As To The Mandatory Parole Term Constituted, At Most, A Failure To Comply With A State Rule Of Criminal Procedure.

The flaw in the court of appeals' reasoning is its failure to understand that the lack of an admonishment as to the mandatory parole term is, at most, a failure to comply with the dictates of Illinois Supreme Court Rule 402. *Ill. Rev. Stat.*, 1975, ch. 110A, §402. Supreme Court Rule 402 was enacted so as to comply with the holding of this Court in *Boykin v. Alabama*, 395 U.S. 238 (1969) that all guilty pleas be "knowing and voluntary"[10] as well as to give greater visability to plea bargaining of the type sanctioned by this Court in *Santobello v. New York*, 404 U.S. 257 (1971). *Ill. Ann. Stat.*, ch. 110A, §402 (Smith-Hurd) (Committee Comments) at 529-530; *People v. Wills*, 61 Ill.2d 105, 330 N.E.2d 505, 508 (1975).

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[10] As used herein, "knowing and voluntary" has the same meaning as "intelligently and knowingly"; "voluntarily and intelligently"; "voluntarily and knowingly"; or "voluntarily and understandingly". *See Boykin v. Alabama, supra* at 241, 244 (1969); *People v. Wills*, 61 Ill.2d 105, 330 N.E.2d 505, 508 (1975).

Supreme Court Rule 402 requires that prior to the acceptance of a guilty plea, the trial court must first determine that a defendant understands the "minimum and maximum sentence prescribed by law, ...." *Ill. Rev. Stat.*, 1975, ch. 110A, §402(a)(2). This requirement did not, however, mandate that a defendant, at the time of the instant pleas, be admonished as to the mandatory parole term. *People v. Wills, supra* at 509.[11]

In *Wills*, the Illinois Supreme Court held that the failure to admonish as to the mandatory parole term was "a factor to be considered in determining whether a plea of guilty was voluntarily and intelligently made." *People v. Wills, supra* at 508. However, the Court noted that the question was a procedural question not involving a constitutional issue or standard. *Id.* at 509. It is submitted that the *Wills* decision, although not directly applicable to the instant pleas since the pleas occurred prior to May 19, 1975, correctly found, as did this Court in *Timmreck*, that the failure to admonish as to a mandatory parole term did not involve a "constitutional issue or standard."

The Illinois mandatory parole term operates in a manner quite similar to the mandatory special parole term provided for in 21 U.S.C. §841(b). The latter, which must be at least two years in length and which may be for as long as life, "is separate from and begins *after* the usual sentence terminates,

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[11] Indeed, at the time of the guilty pleas herein, the Illinois Supreme Court appeared to have affirmatively held that a mandatory parole term admonishment need *not* be given to a defendant who wished to plead guilty. *People v. Krantz*, 58 Ill.2d 187, 317 N.E.2d 559, 564 (1974). A trial judge, and for that matter, any lawyer, who kept up with the decisions of the Illinois Supreme Court could scarcely be faulted for believing that such admonishments were therefore not required in March, 1975.

including any period of supervision." Bureau of Prisons Policy Statement 7500.43 at 2 (January 18, 1973). If a defendant violates the conditions of the special parole term, he may be returned to prison to serve the entire special parole term, not merely the unexpired portion. 21 U.S.C. §841(c). As one court has noted:

> Special parole is a significant penalty. [Citations omitted]. Unlike ordinary parole, which does not involve supervision beyond the original prison term set by the court and the violation of which cannot lead to confinement beyond that sentence, special parole increases the possible period of confinement. It entails the possibility that a defendant may have to serve his original sentence plus a substantial additional period, without credit for time spent on parole.

*Moore v. United States*, 592 F.2d 753, 755 (4th Cir. 1979); *accord, Bell v. United States*, 521 F.2d 713, 715 (4th Cir. 1975).

Similarly, the Illinois mandatory parole term concept provided that a person whose parole was revoked could be reconfined in the following manner:

> [T]he recommitment shall be for that portion of the imposed maximum term of imprisonment or confinement which had not been served at the time of parole, less the time elapsed between the parole of the person and the commission of the violation for which parole was revoked, and, in addition, if the person was sentenced on or after the effective date of this Act the parole term; . . . .

*Ill. Rev. Stat.*, 1975, ch. 38, §1003-3-9(a)(3)(i).

Notwithstanding the above, this Court, in *Timmreck*, chose to characterize the failure to admonish under Rule 11 as being neither "constitutional nor jurisdictional." *United States v. Timmreck, supra* at 783. Just as a failure to admonish as to the special parole term could not be collaterally

attacked as a being a failure to advise a defendant of the "consequences of the plea", so too, must this Court conclude that the failure to advise the respondents of their mandatory parole terms cannot be collaterally attacked under 28 U.S.C. §2254 since habeas relief, for purposes of this case, is limited to constitutional violations.

### C. Longstanding Principles Concerning Finality Of Judgments, Comity, And Federalism Support A Conclusion That Respondents Should Not Be Allowed To Collaterally Attack Their Guilty Pleas By Way Of Federal Habeas Corpus.

This Court has recognized that the "guilty plea and the often concomitant plea bargain are important components of this country's criminal justice system." *Blackledge v. Allison*, 431 U.S. 63, 71 (1977); *see generally Santobello v. New York, supra* at 260-261. Moreover, this Court has recognized that the advantages inherent in guilty pleas can only be secured if such pleas are accorded "a great measure of finality." *Blackledge v. Allison, supra* at 71.

> To allow indiscriminate hearings in federal postconviction proceedings, whether for federal prisoners under 28 U.S.C. §2255 [28 U.S.C.S. §2255] or state prisoners under 28 U.S.C. §§2241-2254 [28 U.S.C.S. §§2241-2254], would eliminate the chief virtues of the plea system—speed, economy, and finality. And there is reason for concern about that prospect. More often than not a prisoner has everything to gain and nothing to lose from filing a collateral attack upon his guilty plea. If he succeeds in vacating the judgment of conviction, retrial may be difficult. If he convinces a court that his plea was induced by an advantageous plea agreement that was violated, he may obtain the benefit of its terms. A collateral attack may also be inspired by "a mere desire to be

> freed temporarily from the confines of the prison." *Price v. Johnston*, 334 U.S. 266, 284-285, 92 L.Ed. 1356, 68 S. Ct. 1049; *accord, Machibroda v. United States*, 368 U.S. 487, 497, 7 L.Ed. 2d 473, 82 S. Ct. 510 (Clark, J., dissenting).

*Id.* at 71-72.

Indeed, as Mr. Justice Stevens noted in *Timmreck*:

> [T]he concern with finality served by the limitation on collateral attack has special force with respect to convictions based on guilty pleas.
>
> 'Every inroad on the concept of finality undermines confidence in the integrity of our procedures; and, by increasing the volume of judicial work, inevitably delays and impairs the orderly administration of justice. The impact is greatest when new grounds for setting aside guilty pleas are approved because the vast majority of criminal convictions result from such pleas. Moreover, the concern that unfair procedures may have resulted in the conviction of an innocent defendant is only rarely raised by a petition to set aside a guilty plea.'

*United States v. Timmreck, supra* at 784. (Citation omitted).

Furthermore, as was noted by this Court, in a slightly different context (*i.e.*, the issue of exhaustion of available state court remedies), the federal habeas corpus power:

> [S]hould be exercised in the light of the relations existing, under our system of government, between the judicial tribunals of the Union and of the states, and in recognition of the fact that the public good requires that those relations be not disturbed by unnecessary conflict between courts equally bound to guard and protect rights secured by the constitution.

*Ex parte Royall*, 117 U.S. 241, 251 (1886).

These well-established principles of comity and federalism are especially important when considered in connection with a §2254 proceeding.

> State judges, like federal judges, have a constitutional obligation to uphold federal law .... There is no compelling reason to think that a federal district judge is more expert—in terms of familiarity or ability—than state appellate courts in interpreting the constitutional decisions of the Supreme Court.

Note, *Developments in the Law — Federal Habeas Corpus, supra* at 1059-1060.

As previously noted, the Illinois Supreme Court has held that a failure to admonish as to the mandatory parole term, while a factor to be considered in determining whether a guilty plea was "knowing and voluntary" does not involve a "constitutional issue or standard." *People v. Wills, supra* at 508-509.

Petitioner submits that if the federal courts are not to grant collateral relief under §2255 to *federal* prisoners because a failure to admonish as to the mandatory special parole term is "neither constitutional nor jurisdictional" than it stands to reason that this Court should apply the same holding to the states for purposes of a §2254 proceeding.

## CONCLUSION

For the foregoing reasons, petitioner urges this Court to reverse that portion of the court of appeals' decision which granted habeas corpus relief to the respondents.

Respectfully submitted,

TYRONE C. FAHNER
Attorney General of the
State of Illinois

HERBERT LEE CAPLAN

MELBOURNE A. NOEL, JR.

MICHAEL B. WEINSTEIN
Assistant Attorneys General
188 W. Randolph St.
Suite 2200
Chicago, Illinois 60601
(312) 793-2570

*Counsel for Petitioner*

Dated: August 19, 1981

Office-Supreme Court, U.S.
FILED
SEP 18 1981
ALEXANDER L. STEVAS,
CLERK

No. 80-1240

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1980

MICHAEL P. LANE, Director
Illinois Department of Corrections,

*Petitioner,*

v.

LAWRENCE WILLIAMS AND OSCAR SOUTHALL,

*Respondents.*

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

## BRIEF FOR RESPONDENTS

MARTHA A. MILLS
Cotton, Watt, Jones, King & Bowlus
Suite 4750
One IBM Plaza
Chicago, Illinois 60611
(312) 467-0590

*Court-appointed Counsel for Respondents*

*Of Counsel:*
SUE ANNE HERRMANN

Washington, D.C. • CLB PUBLISHERS' • LAW PRINTING CO. • (202) 393-0625

## QUESTION PRESENTED FOR REVIEW

Whether the decision of the United States Court of Appeals for the Seventh Circuit conflicts with the decision of this Court in *United States v. Timmreck*.

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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1980

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**No. 80-1240**

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MICHAEL P. LANE, Director
Illinois Department of Corrections,

*Petitioner,*

v.

LAWRENCE WILLIAMS AND OSCAR SOUTHALL,

*Respondents.*

---

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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## BRIEF FOR RESPONDENTS

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## STATEMENT OF THE CASE

Respondents have no disagreement with petitioner's Statement of the Case regarding either respondent Williams or respondent Southall. Respondents only add that Williams first learned of the existence of the mandatory parole term over a year after he was sentenced (J.A. 12) and that Southall was similarly unaware of the existence of the mandatory parole term. (J.A. 65)

## SUMMARY OF ARGUMENT

The decision of this court in *United States v. Timmreck*, 441 U.S. 780 (1979) is inapplicable to the instant case, in that the cases are distinguishable both factually and legally. In addition, while *Timmreck* involved only a technical violation of Rule 11 of the Federal Rules of Criminal Procedure, the instant case involves the breach of a plea agreement which was the basis for a plea of guilty. Guilty pleas induced by unfulfilled promises have long been considered involuntary and in violation of an accused's right to due process of law. *Santobello v. New York*, 404 U.S. 257 (1971); *People v. Washington*, 38 Ill.2d 446 (1967). The Court of Appeals for the Seventh Circuit correctly noted these differences and affirmed the decision of the District Court granting the petitions for writ of habeas corpus. This judgment should be affirmed.

## ARGUMENT

### THERE IS NO CONFLICT BETWEEN THIS COURT'S DECISION IN *UNITED STATES v. TIMMRECK* AND THE COURT OF APPEAL'S DECISION IN THE INSTANT CASE.

### A. The Rationale Of *United States v. Timmreck* Is Inapplicable To The Instant Case.

While respondents have no basic disagreement with petitioner's decription of the facts of *United States v. Timmreck,* 441 U.S. 780 (1979), there are several important differences between the *Timmreck* case and the instant case which cause that decision to be inapplicable here. Defendant Timmreck pleaded guilty to the charge of conspiracy to distribute controlled substances in the federal district court. Addressing the defendant as required by Rule 11 of the Federal Rules of Criminal Procedure, the district court advised Timmreck of the maximum penalty, 15 years imprisonment and a fine of $25,000, but failed to describe the mandatory special parole of at least 3 years. The district court accepted Timmreck's gulty plea, and, at a later proceeding, sentenced Timmreck to ten years imprisonment, a $5,000 fine, and a special parole term of five years. No ojection was made to the sentence and no appeal was taken from the judgment.

Two years later, Timmreck moved to vacate the sentence pursuant to Title 28 U.S.C. §2255 on the ground that the trial court violated the terms of Rule 11 in not advising him of the mandatory parole term at the time he pleaded guilty. There was no contention by Timmreck that he did not know of the mandatory parole or that he would not have pleaded guilty had he known of the mandatory parole. Timmreck's only claim was a technical violation of Rule 11, which could, and should, have been raised by direct appeal.

Unlike defendant Timmreck, the respondents herein were not advised at any proceeding of a mandatory parole term. Petitioner Williams did not learn of the existence of the mandatory parole term until well over a year after he was

sentenced, and approximately two months before his discharge date. (J.A. 12) Likewise, while respondent Southall did not state the exact date on which he learned of mandatory parole term, his petition for writ of habeas corpus stated that he did not appeal from the judgment of conviction or the imposition of sentence because he was not aware that he could or would be required to serve mandatory parole. (J.A. 65) Unlike Timmreck, neither Williams nor Southall were informed at the change of plea proceedings and contemporaneous sentencing that their sentences included a mandatory parole term.

Finally, there was no prejudice to Timmreck from the failure to comply with the formal requirements of Rule 11. Timmreck was actually sentenced to the parole term by the trial court. In the instant case, however, respondents were unknowingly subjected to a substantially greater term than they were actually sentenced to serve. Both were given three year terms in addition to their *agreed upon* sentences. Such an error is not a technical violation, but rather, a violation of respondents' rights to due process of law.

Contrary to the petitioner's assertion that the "gist of this Court's holding *[inTimmreck]* was that a violation of Rule 11 is neither constitutional nor jurisdictional, (Pet. Brf., p. 15) the essence of the *Timmreck* decision is a reaffirmation of the long standing principle that:

> So far as convictions obtained in the Federal Courts are concerned, the general rule is that the writ of habeas corpus will not be allowed to do service for an appeal. *Sunal v. Large,* 332 U.S. 174, 178 (1947).

Such collateral attacks, as in *Timmreck,* have been particularly disfavored by this Court. "It is plain, however, that the writs is not designed for collateral review of errors of law committed by the trial court." *Sunal v. Large, supra,* at 179.

Mr. Justice Stevens, writing for a unanimous Court in *Timmreck,* specifically noted that defendant Timmreck did not argue that he was actually unaware of the special parole term or that if he had been properly advised by the trial judge, he would not have pleaded guilty. Rather, Timmreck's only claim was of a technical violation of Rule 11.

> That claim could have been raised on direct appeal, [Citation omitted] but was not. And there is no basis here for allowing collateral attacks "to do service for an appeal." *Sunal v. Large,* 332 U.S. 174, 178. 441 U.S. at 784.

Mr. Justice Stevens went on to limit the holding in *Timmreck*, just as the Court had done in *Hill v. United States,* 368 U.S. 424 (1962).[1]

> As in *Hill,* we find it unnecessary to consider whether §2255 relief would be available if a violation of Rule 11 occured in the context of other aggravating circumstances. "We decide only that such collateral relief is not available when all that is shown is the failure to comply with the formal requirements of the rule." 368 U.S. 429, 441 U.S. at 785.

No similar claim, that respondents have waived their right to challenge the mandatory parole term by writ of habeas

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[1]In *Hill v. United States, supra,* defendant Hill sought relief under §2255 where he was not permitted, as required by Rule 32(a) of the Federal Rules of Criminal Procedure, to make a statement on his own behalf at sentencing. This Court affirmed the denial of the motion on the ground that absent a "fundamental defect which inherently results in a complete miscarriage of justice," such errors are not cognizable in the absence of any prejudice to the petitioner. Indeed, in *Hill,* it was not even alleged that the petitioner would have said anything if allowed to. Hence the defect was neither fundamental nor did it result in a miscarriage of justice.

corpus, has ever been raised in the instant case by petitioner, nor is such claim raised here. Rather, it is clear that respondents did not discover the existence of the mandatory parole term until after the time to appeal had run. Thus, the waiver problem apparent in *Timmreck* is not present in the instant case.

Aside from this fundamental difference between the two cases, there is another substantial difference between *Timmreck* and the instant case, the difference between the terms of the plea agreement. In *Timmreck*, the terms of the plea bargain with the prosecutor were that Timmreck would plead guilty to a charge of conspiracy to distribute various controlled substances in exchange for dismissal of other charges pending against him. 441 U.S. at 782. This bargain was kept by the prosecutor.

In the instant case, on the other hand, respondent Williams agreed to plead guilty to a single charge of burglary in exchange for an indeterminate sentence of one to two years in the Illinois penitentiary. The terms of this agreement were accepted by the trial court. (J.A. 25). Similarly, respondent Southall agreed to plead guilty to one count of burglary in exchange for an indeterminate sentence of one to three years in the Illinois penitentiary, which agreement was reached in the presence of, and with the approval of the trial judge. (J.A. 74-77) In neither case were the terms of the agreement lived up to by the State.

Instead, after respondents arrived at their designated institutions, they discovered that they would be subject to additional three year mandatory parole terms which were not part of their agreements with the prosecutor or the court. The flaw involved in the instant case is far more severe than the mere technical violation of Rule 11 alleged in *Timmreck*. The flaw here is the failure of the State to live up to its

agreements. Where liberty and the rights attendant to one accused of a crime are the price paid for a specific sentence, it is absolutely essential that persons such as respondents herein have a meaningful avenue to enforce such agreements. The District Court and the Court of Appeals correctly provided that avenue in the instant case. That decision should be affirmed.

### B. The Failure To Admonish Respondents As To The Mandatory Parole Terms Constituted A Violation Of Their Due Process Rights.

Petitioner relies on the assertion that the "flaw" in the rationale of the Court of Appeals was its failure to understand that the lack of admonition to the mandatory parole term is, "at most, a failure to comply with the dictates of Illinois Supreme Court Rule 402, Ill. Rev. Stat. 1975, Chapter 110, §402." (Pet. Brf., p. 18) Petitioner finds support for this statement in *People v. Wills,* 61 Ill.2d 105 (1975), wherein the Illinois Supreme Court held that the failure to advise the defendant Wills of the mandatory parole term did not involve a constitutional issue. Respondents, however, submit that this rationale is itself "flawed" in two respects. First, as noted above, (Resp. Brf., pp. 3-7) there are several important factual differences between the instant case and *Timmreck* inapplicable here. Second, petitioner's position ignores previous case law which established a constitutional standard for accepting guilty pleas based on plea agreements, and subsequent case law which has altered the effect of *People v. Wills, supra.*

The plea bargining process has long been the skeleton in the closet of the criminal justice system. While tacitly recognizing the existence of the procedure, courts attempted

to look the other way when guilty pleas were actually entered. *See, e.g., Blackledge v. Allison,* 431 U.S. 63, 76 (1977) The importance of guilty pleas for both the accused and the State eventually could not be overlooked, and the integrity of plea bargaining agreements came to the forefront. In *Machibroda v. United States,* 368 U.S. 487 (1962), this Court held:

> A guilty plea, if induced by promises or threats which deprive it of the character of a voluntary act, is void. A conviction based upon such a plea is open to collateral attack. [Citations omitted] "A plea of guilty differs in purpose and effect from a mere admission or an extra judicial confession; it is itself a conviction. Like a verdict of a jury it is conclusive. More is not required; the Court has nothing to do but give judgment and sentence. Out of just considerations for persons accused of crimes, courts are careful that a plea of guilty shall not be accepted unless made voluntarily after proper advice and with full understanding of the consequences." *Kercheval v. United States,* 274, U.S. 220, 223. 368 *U.S. at 493.*

Following the decision in *Machibroda,* in *Boykin v. Alabama,* 395 U.S. 238 (1969) and *Brady v. United States,* 397 U.S. 742 (1970), this Court emphasized that for a guilty plea to withstand appellate or post-conviction review, the record must affirmatively disclose that the plea was entered understandingly and voluntarily. *Brady v. United States, supra,* at 747, n.4; *Boykin v. Alabama, supra,* at 242. Indeed, a waiver of the panoply of rights guaranteed to an accused must not only be voluntary, but also must be a knowing and intelligent act done with "sufficient awareness of the relevant circumstances and likely consequences." *Brady v. United States, supra,* at 748. As noted by petitioner, the Illinois legislature sought to ensure that any

such waiver would be voluntary when it amended Illinois Supreme Court Rule 402 in 1970 to require compliance with the requirements of *Boykin v. Alabama, supra,* and to give "visibility to the plea agreement process and thus provide the reviewing court with a record containing an accurate and complete account of all relevant circumstances surrounding the guilty plea." *Committee Comments, 50 Ill.2d R.402 (June, 1970).*

One year later, in *Santobello v. New York,* 257 (1971), this Court openly recoginzed plea bargaining agreements.

> The disposition of criminal charges by agreement between the prosecutor and the accused, sometimes loosely called "plea bargining," is an essential component of the administration of justice. Properly administered, it is to be encouraged. If every criminal charge were subjected to a full-scale trial, the States and the Federal Government would need to multiply by many times the number of judges and court facilities.
>
> Disposition of charges after plea discussions is not only an essential part of the process but a highly desirable part for many reasons. 404 U.S. at 260-261.

After noting the benefits to both the accused and society, the Court continued:

> However, all these considerations presuppose fairness in securing agreement between an accused and the prosecutor. . . . The plea must, of course, be voluntary and knowing and if it was induced by promises, the essence of those promises must in some way be made known. . . .
>
> This phase of the process of criminal justice, and the adjudicative element inherent in accepting a plea of guilty, must be attended by safeguards to ensure the defendant what is reasonably due in the circumstances. Those circumstances will vary, but a constant factor is that when a plea rests in any significant degree on a

> promise or agreement of the prosecutor, so that it can be said to be part of the inducement or consideration, such promise must be fulfilled. 404 U.S. at 261-262.

Thus, not only must the defendant receive the benefit of his bargain, but also, he must have an avenue to enforce the terms of any such agreement. The same principle was recognized by the Illinois Supreme Court in *People v. Washington,* 38 Ill.2d 446 (1967). Any plea of guilty which is induced by unfulfilled promises loses its voluntary nature and should be considered void. 38 Ill.2d at 449-450.

In 1975, the Illinois Supreme Court was faced with a case factually similar to *United States v. Timmreck, supra.* In *People v. Wills,* 61 Ill.2d 105 (1975), defendant Wills pleaded guilty to the offenses of burglary, escape and armed robbery. There is no indication, however, whether Wills pleaded guilty pursuant to plea agreements. Wills was sentenced to concurrent sentences of 3 to 9 years for burglary, 3 years and 4 months to 10 years for escape, and 5 to 30 years for armed robbery. Wills was not advised that a mandatory parole term attached to the sentences for burglary and escape, however, he was advised by the trial court that a five year mandatory parole term would attach to the sentence for armed robbery. 61 Ill.2d at 108. While the Illinois Supreme Court affirmed the judgments of conviction on the ground that Wills had been admonished concerning the mandatory parole provision, the court reconsidered its previous position in *People v. Krantz,* 58 Ill.2d 187, 195 (1974), and held that compliance with Illinois Supreme Court Rule 402(a)(2) requires that a defendant must be admonished that the mandatory period of parole pertaining to the offence is a part of the sentence that will be imposed and that he can be held subject to the jurisdiction of the Parole and Pardon Board for a period of

time equal to the maximum term of imprisonment provided in the indeterminate sentence and the parole term. 61 Ill.2d at 109. In a supplementary decision, the Court added that this change was to be considered a procedural change not involving a constitutional issue or standard, and that the requirement of admonition as to the mandatory parole term would apply prospectively.

Since the ruling in *People v. Wills, supra,* several courts have had the opportunity to review pleas of guilty which were attacked on the ground that there was a failure to advise the defendant of the mandatory period of parole. In *United States ex rel. Baker v. Finkbeiner,* 551 F.2d 180 (7th Cir. 1977), on a petition for writ of habeas corpus, the Court of Appeals for the Seventh Circuit held that the petitioner's right to due process of law had been violated. Petitioner Baker pleaded guilty pursuant to a plea agreement between his attorney and the prosecutor. No mention was made by the court, the prosecutor, or the defense attorney of any mandatory period of parole.[2] Ruling that a failure to admonish Baker constituted a deprivation of his right to due process of law, the Court of Appeals noted:

> [Baker] agreed to plead guilty in exchange for the promise of specific sentence by the prosecutor, which was then ratified by the trial judge. Yet he was given a more onerous sentence than he had been promised. . . .

---

[2]Since Baker's plea was taken prior to May 19, 1975, the date on which *People v. Wills, supra,* was decided, the *Wills decision had no effect on this case.*

> The correct test to be used in determining whether the circumstances surrounding Baker's negotiated guilty plea violated the Due Process Clause is that the plea must withstand collateral attack unless the sentence actually imposed upon Baker significantly differs from the sentence which the prosecutor and the trial court promised him. 551 F.2d at 183.

Noting that the imposition of a two year parole term was indeed, a significant punishment, the court held that fundamental fairness demanded that the State be compelled to adhere to its agreement as well as the petitioner, citing *Santobello v. New York,* 404 U.S. 257, 261-263 (1971). In a companion case, *United States ex rel. Ferris v. Finkbeiner,* 551 F.2d 185 (7th Cir. 1977), *cert. denied sub nom. Rowe v. Ferris,* 435 U.S. 932 (1978), the Court of Appeals held that where a petitioner pleaded guilty pursuant to a plea agreement and was affirmatively, but incorrectly, advised by the trial court that he would not have to serve the mandatory five year parole term, his right to due process of law had been violated.

Subsequently, in *People v. McCoy,* 74 Ill.2d 398 (1979), the Illinois Supreme Court concurred with the holdings of the Court of Appeals in *United States ex rel. Baker v. Finkbeiner, supra,* and *United States ex rel. Ferris v. Finkbeiner, supra.* The Illinois Supreme Court, however, distinguished *McCoy* from both *Baker* and *Ferris* because defendant McCoy neither alleged nor asserted that he had been promised anything more than a recommendation that he be sentenced to an indeterminate term of one to three years.

> The facts here are, however, clearly distinguishable [from the facts in *Baker* and *Ferris*]. It was not alleged in the amended post-conviction petition, nor asserted in

> defendant's brief, that defendant was promised anything more than a recommendation that the sentence be 1 to 3 years. In contrast, in *Baker* there was an agreement that the prison sentence would be 1 to 2 years (551 F.2d 180, 181) and in *Ferris* the defendant, in response to an inquiry directed to the court, was erroneously advised concerning the mandatory period of parole. 74 Ill.2d at 404.

Thus, the Illinois Supreme Court recognized that in cases where a defendant pleads guilty pursuant to a negotiated plea agreement, there is more than a technical violation of a court rule. There is, in fact, a denial of a substantial right which robs the plea of its voluntary character.

Following *People v. McCoy, supra,* the Court of Appeals for the Seventh Circuit agreed with the decision of the Illinois Supreme Court in *United States ex rel. Williams v. Morris,* 594 F.2d 614 (7th Cir. 1979).

> *McCoy* considers our holding in *Baker* and in *Ferris* and properly distinguishes them on the basis that in *Baker* there was an agreement, and in *Ferris* the defendant was misinformed that he would not have to serve a mandatory parole term. 594 F.2d at 619.

The Court of Appeals utilized the same rationale in its decision in the instant case. *United States ex rel. Williams v. Morris,* 663 F.2d 71 (7th Cir. 1980) (J.A. 50-52). The court correctly concluded that the instant case was distinguishable from *United States v. Timmreck, supra,* and that more than a technical violation of a procedural rule was involved. The court found no reason to reexamine its decision in *United States ex rel. Baker v. Finkbeiner, supra,* as requested by petitioner, and correctly held that respondents, like petitioner Baker, had been deprived of the benefit of their plea bargains in violation of the Due Process Clause. This decision should be affirmed.

### C. Neither Considerations Of Comity, Finality Of Judgments, Nor Of Federalism Dictate That Respondents Should Not Be Allowed To Collaterally Attack Their Guilty Pleas By Writ Of Habeas Corpus.

As a final argument, petitioner contends that considerations of comity, finality of judgments, and federalism should prevent respondents from collaterally attacking their guilty pleas by writ of habeas corpus. This argument is difficult to comprehend in light of the seriousness of respondents' claims and the prejudice that would inure to them if they were not allowed an avenue to enforce their agreements with the state. Under petitioner's rationale, finality of judgments would take precedence over considerations of justice and fair play. Such a view defeats the purpose of the writ of habeas corpus.

> Yet arrayed against the interest in finality is the very purpose of the writ of habeas corpus—to safeguard a person's freedom from detention in violation of constitutional guarantees. *Harris v. Nelson,* 394 U.S. 286, 290-291. "The writ of habeas corpus has played a great role in the history of human freedom. It has been the judicial method of lifting undue restraints upon personal liberty." *Price v. Johnston, supra,* at 269. And a prisoner in custody after pleading guilty, no less than one tried and convicted by a jury, is entitled to avail himself of the writ in challenging the constitutionality of his custody. *Blackledge v. Allison,* 431 U.S. 63, 72 (1977).

Those problems cited by petitioner, also from *Blackledge v. Allison, supra.* at 71, are simply not present in the instant case. There is no danger of vacating a judgment of conviction and forcing the state to retry the case years later. Rather than having "nothing to lose" from filing a collateral attack upon

his guilty plea, respondents herein would be substantially prejudiced if they did not collaterally attack the imposition of the mandatory parole terms. Respondents seek only what they bargained for and agreed to, nothing more. In cases of this nature, guilty pleas have not been set aside. The court has merely enforced specific performance of the State's bargain by excising the mandatory parole term.

Finally, petitioner's suggestion that principles of comity and federalism should prevail in the instant case smacks of a judicial repeal of § 2254 of the Judicial Code and Judiciary, Title 28 U.S.C. §2254 (1948). Congress saw fit to preserve the great writ over thirty years ago. The grave step suggested here by petitioner whould only be undertaken by Congress. The situation in the instant case is in no way analagous to the requirement of exhaustion of available state remedies. These respondents have no such remedy. (J.A. 46) Thus, they would be precluded from any remedy for violation of constitutional rights. In such a case, no interest, state or federal, is served.

## CONCLUSION

For the foregoing reasons, respondents respectfully request that this Court affirm the decision of the Court of Appeals for the Seventh Circuit granting respondent's petitions for writ of habeas corpus.

Respectfully submitted,

MARTHA A. MILLS
Court-appointed Counsel for
Respondents

*Of Counsel:*
SUE ANNE HERRMANN

Office - Supreme Court, U.S.
FILED
NOV 25 1981
ALEXANDER L. STEVAS

No. 80-1240

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## ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

## REPLY BRIEF FOR THE PETITIONER

TYRONE C. FAHNER
Attorney General of the
State of Illinois
HERBERT LEE CAPLAN
MELBOURNE A. NOEL, JR.
MICHAEL B. WEINSTEIN
ASSISTANT ATTORNEYS GENERAL
188 WEST RANDOLPH STREET
SUITE 2200
CHICAGO, ILLINOIS 60601
(312) 793-2570

*Counsel for Petitioner*

Printed by the Authority of the State of Illinois — 11-24-81

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### ARGUMENT

**THE COURT OF APPEALS' DECISION IN THIS CASE CONFLICTS WITH THIS COURT'S RECENT DECISION IN *UNITED STATES V. TIMMRECK*, AND THEREBY GOES BEYOND THE DUE PROCESS REQUIREMENTS PREVIOUSLY ENUNCIATED BY THIS COURT PERTAINING TO "KNOWING AND VOLUNTARY" GUILTY PLEAS.**

Respondents perceive the instant case as a case involving "the failure of the State to live up to its agreements." Respondents' Brief at 6-7. They place primary reliance upon this Court's decision in *Santobello v. New York*, 404 U.S. 257 (1971), wherein this Court stated that:

> [A] constant factor is that when a plea rests in any significant degree on a promise or agreement of the prosecutor, so that it can be said to be part of the inducement or consideration, such promise must be fulfilled.

404 U.S. at 262; Respondents' Brief at 9-10.

In relying upon *Santobello*, respondents fail to recognize that the mandatory parole terms, with which we are concerned, automatically attached, by operation of law, to every felony sentence involving incarceration entered in Illinois after January 1, 1973. *See Ill. Rev. Stat.*, 1975, ch. 38, § 1005-8-1(e). Because of this fact, there really was no promise or even agreement with the prosecutor which could be said to have been "part of the inducement or consideration" for the guilty pleas. The mandatory parole terms attached automatically whether respondents were to receive one year imprisonment or twenty years imprisonment, and nothing which the prosecutor or judge could have said or done would have changed that fact. Thus, absent an allegation that respondents would not have pled guilty had they known of the existence of the parole terms prior to the entry of their pleas, it simply cannot be said that the failure to admonish respondents of the existence of the parole terms acted as part of the "inducement or consideration" of their plea bargains.[1]

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[1] Additionally, it should again be noted that at the time of the guilty pleas herein, the Illinois Supreme Court appeared to have affirmatively held that a mandatory parole term admonishment need *not* be given to a defendant who wished to plead guilty. *People v. Krantz*, 58 Ill. 2d 187,

Additionally, it appears that each respondent, while apparently unaware of the existence of the mandatory parole term at the time of his plea, did, in fact, become aware of the term prior to his release from prison on parole. Nevertheless, each chose to disregard the possible consequences, for within a relatively short period of time, each voluntarily violated the terms of his parole and was reincarcerated. Thus, even if an admonishment at the time of the actual plea would have been a better policy to follow, the respondents were not prejudiced by the court's failure to warn them of the parole terms at that time. This view is buttressed by the fact that neither respondent has alleged that he would not have pled guilty had he been advised of the parole term.

In short, the failure to admonish in the instant proceeding was, at most, a technical violation of Illinois Supreme Court Rule 402. *Ill. Rev. Stat.*, 1975, Ch. 110A, § 402. As such, this Court's decision in *United States v. Timmreck*, 441 U.S. 780 (1979), should control.

In *Timmreck*, the defendant was not admonished as to the parole term at the time he pled guilty. Subsequently, he became aware of the term. His destiny was in his own hands. Only if he chose not to act within the confines of the law could he have been reincarcerated. The same facts are present in this case and the same conclusion as was reached in *Timmreck* should be reached here.

Finally, petitioner does not suggest that respondents "not be allowed an avenue to enforce their agreements with the state." Defendants' Brief at 14. Direct appeal, or as was

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317 N.E.2d 559, 564 (1974). A trial judge, and for that matter, any lawyer, who kept up with the decisions of the Illinois Supreme Court could scarcely be faulted for believing that such admonishments were therefore not required in March, 1975.

recognized in the appeal in *Williams* I [*United States ex rel. Williams v. Morris*, 594 F.2d 614 (7th Cir. 1979)] an Illinois post-conviction hearing act petition, provides ample opportunity for judicial review. What petitioner does suggest, however, is that federal habeas corpus relief not be imposed upon a sovereign state, where no federal constitutional right has been violated.

## CONCLUSION

For the foregoing reasons, as well as the reasons mentioned in our initial brief, petitioner urges this Court to reverse that portion of the court of appeals' decision which granted habeas corpus relief to the respondents.

Respectfully submitted,

TYRONE C. FAHNER
Attorney General of the
State of Illinois

HERBERT LEE CAPLAN

MELBOURNE A. NOEL, JR.

MICHAEL B. WEINSTEIN
Assistant Attorneys General
188 West Randolph Street
Suite 2200
Chicago, Illinois 60601
(312) 793-2570
*Counsel for Petitioner*

November 23, 1981